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In the Supreme Court of the United States

October Term, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS, AND EDWIN McBRAYER,
Petitioners,

vs.

N.T. GREENE, ELNORA PRIEST CROSS, EDWIN OWENS AND CAROLYN BURSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 1, 1979.

OPINIONS BELOW

The October 4, 1974, "Order on Motions to Dismiss" filed by the District Court for the Western District of Tennessee, Western Division, has not been officially published, and appears in the Appendix at page A1. (All references to Appendices to this petition are hereafter preceded by designation "A".) The opinion of the Sixth Circuit Court of Appeals, decided May 13, 1976, reversing the October 4, 1974, district court order, and remanding the cause back to the district court, is reported at 535 F.2d 976 (6th Cir. 1976), and is printed at (A11). The memorandum decision of the District Court for the Western District of Tennessee, Western Division, filed June 21, 1978, has not been officially published, and appears in the Appendix at (A19). The opinion of the Sixth Circuit Court of Appeals filed November 1, 1979, reversing the district court judgment and remanding the cause for the fashioning of appropriate injunctive relief has not yet been officially reported, and is set out at (A38). The order of the Sixth Circuit Court of Appeals denying the petitioners' petition for rehearing with a suggestion that the petition be heard by the court sitting en banc was filed December 11, 1979, and has not been officially published. It appears in the Appendix at (A70).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered November 1, 1979. On December 11, 1979, the court filed an order denying the petitioners' request for a rehearing with a suggestion that the petition be heard by the court sitting en banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The questions presented for review in this petition for Writ of Certiorari are:

1. Whether a municipality's exercise of its police powers to close a street to through traffic in order to achieve in a residential area permissible goals of reducing the flow of traffic, enhancing safety, and reducing noise and litter, constitutes a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution when there is no evidence that racial motivation or intent was a factor in the decision?

2. Whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution can be established without a showing of racially discriminatory intent or purpose?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Thirteenth and Fourteenth Amendments to the United States Constitution. Those Amendments read as follows:

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. Vol. 1 U.S.C. pg. XLVII (1964).

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. Vol. 1 U.S.C. pg. XLVII (1964).

The federal statutory provisions involved in this case are 42 U.S.C. §1982 and 42 U.S.C. §1983. 42 U.S.C. §1982 (1964) provides in Vol. 9 U.S.C. pg. 8020:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §1983 (1964) provides in Vol. 9 U.S.C. pg. 8021:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

The Charter of the City of Memphis, Tennessee, provides on page 198 in Section 452 as follows:

> The governing authorities of said City of Memphis shall have full authority to convey any property acquired by them or held by the City of Memphis not used for municipal purposes, and to give good title thereto to any purchaser. Said City shall also have power to convey any street or alley closed by it by virtue of municipal authority, and to convey good title to said street or alley as far as any title held by said City is concerned. The said City shall further have authority to close by resolution any street or alley whenever, in the judgment of the Board of Commissioners, the closing of said street or alley shall be conducive to the public welfare. (Priv. Acts 1913 C.H. 163; Priv. Acts 1939, C.H. 173, Section 2).

STATEMENT OF THE CASE

Procedural Background

This action originated in 1974 with the filing of a complaint in the United States District Court for the Western District of Tennessee, Western Division, by N.T. Greene, and others who are no longer active participants in the lawsuit. The complaint alleged that the proposed partial closing of a portion of a public residential street known as West Drive, located in the City of Memphis, Tennessee, was racially discriminatory. This portion of the complaint, as amended, was dismissed by the district court upon a Motion to Dismiss filed on behalf of defendants. (A1).

On appeal the United States Court of Appeals for the Sixth Circuit reversed and remanded the cause on the basis that in the court's opinion the original plaintiff,

Greene, had stated claims upon which relief might be granted under 42 U.S.C. §1982 and 42 U.S.C. §1983. *See, Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976). (A11).

In its opinion remanding the cause, the court stated in part:

> "We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. §1982 confers on '(a) all citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.' The complaint and amended complaint construed favorably to the pleader reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race 'hold' their 'real property', on a less equal basis, than similarly situated whites who 'hold' their 'real property' subject to having the City confer the dead-end street benefit on their property. 535 F.2d at 978. . .
>
> We view Greene as having stated §1983 claims against the Mayor and Council Chairman, those 'person(s)' clearly acting 'under color of . . . ordinance' and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on 'white' streets, but not on 'black' streets, because of the color of the residents of the streets." 535 F.2d at 978, 979.

After remand, intervention was allowed for plaintiffs Owens, Burse, and Cross and amendments to the complaint

concerning the lack of sidewalks along West Drive, the existence of a class action and pendent jurisdiction were allowed. Jurisdiction in the district court was based on 28 U.S.C. §1343 (3) and (4). (See p. 2 of the district court's Pre-Trial Order). A two-day trial was held before the trial judge without the intervention of a jury. On June 21, 1978, the district court held that the partial closing of West Drive would not violate plaintiff's rights under either 42 U.S.C. §1982, 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, or pendent State law claims. The court set forth its findings of fact and conclusions of law in a memorandum decision. (A19). The trial court held, making reference to the Sixth Circuit's earlier observations:

> . . . that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens. (A43).

The court went further and held that, in addition, "there is not sufficient proof of racially discriminatory intent or purpose on the part of the City officials to establish a constitutional violation." (A43). The court also found that there were not any violations of the plaintiffs' rights under either the Due Process or Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. (A57).

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of the district court. The cause was remanded for the fashioning of appropriate injunctive relief. (A58).

The Sixth Circuit majority opinion concluded that the erection of a barrier at the northern boundary of West Drive constituted a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment to the United States Constitution and entitling them to relief under 42 U.S.C. § 1982. (A57).

The majority opinion agreed with the district court's conclusions that there was no basis for the relief requested by the plaintiffs seeking sidewalks, curbs and gutters along West Drive, and that the plaintiffs had failed to prove their claims of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments. (A57).

A dissenting opinion was filed in the Sixth Circuit Court of Appeals by Circuit Judge Anthony J. Celebrezze. The dissenting opinion noted that the majority opinion expanded the scope of 42 U.S.C. §1982 to an unprecedented extreme and conflicted with the well-established policy of judicial deference to legislative judgment in land use regulation. It noted that a finding of discriminatory intent or purpose should be a requirement to establishing a violation under 42 U.S.C. § 1982. (A61).

Petitioners asked for a rehearing with a suggestion that the rehearing be held en banc, however, since less than a majority of the judges of the court who were in regular active service favored a rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. The original panel denied the

petition for rehearing, with Judge Celebrezze again dissenting on December 11, 1979. (A70).

Statement of Facts

On July 9, 1973, an application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association for the closing of a portion of a public residential street known as West Drive, which would make that street into a cul-de-sac. The application states that the reasons for the requested closure are to:

1. Reduce flow of through traffic using subdivision streets,

2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School,

3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interuption (sic) of community living. (Trial exhibit 13).

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government in an attempt to discern their feelings regarding the closure. The information sought is of an advisory nature and is not controlling upon either the Planning Commission or the City Council. After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (Transcript, hereinafter designated as "TR.", pgs. 173, 174 and Trial exhibit 4).

The matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing including respondent, Greene. Each side was given fifteen (15) minutes to present their views. (Trial exhibit 26).

After the presentations were made and discussion was had among the members of the City Council, a vote was taken on the resolution to close a portion of West Drive with certain conditions. The resolution passed. (Trial exhibits 1 and 26).

On several subsequent occasions the City Council reconsidered its action, and each time voted in favor of closing a portion of West Drive to through traffic. (Trial exhibits 2, 27, 28, 29, 30, 31, 32 and 41).

The closing procedure used by the City Council had never before been used to close a street that served as a thoroughfare for the residents and the public. It had, however, been used on numerous other occasions to close alleys and dedicated, but unused streets. From that standpoint the closing procedure used by the City Council has benefited black citizens, as well as white citizens. (Trial exhibits 33, 34, 36, 37, and 39 and TR. 257-260, 262-264, 265-270).

West Drive is a two-lane residential street beginning on the northern boundary at its intersection with Jackson Avenue and proceeding in a southerly direction to its terminus at its intersection with North Parkway approximately one-half mile from its beginning at Jackson Avenue. Opposite West Drive on the north side of Jackson Avenue

is a major four-lane thoroughfare, known as Springdale Street.

At the time the City Council voted to close a portion of West Drive and at the time of the trial in the district court, all of the residents along West Drive were white. The district court took judicial notice during closing argument of counsel that the area north of Jackson in this vicinity was predominantly black. (TR. 323-324).

The rationale behind the closure of this street was to provide the residents of the area with a more tranquil neighborhood. (TR. 205). Traffic is not greatly inconvenienced by the closure, since one block to the east is a street that gives straight access all the way to South Memphis and the State of Mississippi. To the west are University and McLean Streets, which are major thoroughfares offering additional access to South Memphis and to Overton Park and Snowden School. (TR. 205-206). Access to the Hein Park Subdivision remains available on the northern side at the intersection of Jackson and Cypress Drive and at the intersection of Jackson and Charles Drive. (TR. 205).

The respondents offered the testimony of Mr. Harold Moore, a licensed real estate broker to the effect that the proposed closing would be a real benefit to the residents on West Drive. Mr. Moore also testified "there would not be a lessening of value in those properties in the Springdale area". (TR. 91, 92). The Sixth Circuit Court of Appeals opinion noted that subsequently Mr. Moore testified that there could be a deterring psychological effect on those individuals who live north of the Hein Park area, and he speculated that this could have a detrimental effect on the property values in the future. (A48). The district judge, however, apparently did not accept

this latter speculation, since it was not included in his findings of fact. (A47).

Dr. Marvin Feit also testified as an expert witness that closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. (TR. 102, 103).

The district court after finding that the closing procedure used by the City of Memphis had benefited black citizens, as well as white citizens, continued its analysis of the Council's action by considering the factors enunciated by this Court in *Arlington Heights v. Metropolitan Housing Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) as relevant to a sensitive inquiry into the motivations of a legislative or administrative body. The district court in analyzing the present case according to the standards of *Arlington Heights, supra,* found that the closure of West Drive in the manner adopted by the City Council would have a disproportionate impact on certain black citizens. (A43). This disparate impact according to the court, existed because "the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return." (A44).

The petitioners in their brief filed in the Court of Appeals took exception with this finding on the basis that the court had compared the effect on black motorists with the effect upon white residents along West Drive, which the petitioners claim are not similarly situated classes.

(See brief of appellees in the United States Court of Appeals for the Sixth Circuit, pgs. 21 and 22).

Nevertheless, the district court found that the disparate impact was not so stark as to infer a purpose or intent of racial discrimination by the Council. (A43). The court upon examining the other factors listed in *Arlington Heights, supra,* found that there was not sufficient proof of racially discriminatory intent or purpose upon the part of the city officials to establish a constitutional violation. (A44).

The majority opinion of the Sixth Circuit Court of Appeals does not even address the question of whether there was adequate proof of racial motivation or intent on the part of the Council. In a footnote near the end of the majority's opinion, the court stated "we expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under §1982." (A57).

In his dissent, Judge Celebrezze agreed with the district court that there was a disparate impact caused by the closing of West Drive that was both racial and geographical in nature. (A61). He also agreed with the district court that this disparity did not constitute a stark pattern of discrimination which would permit one to infer racial intent. He noted, "the record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive 'because of' the adverse effects the black citizens north of Hein Park might experience." (A67). His use of the words "because of" was a result of the standard set by this Court's opinion in *Personnel Administrator of Mass. v. Feeney,* ..... U.S. ....., 99 S.Ct. 2282 (1979).

REASONS FOR GRANTING CERTIORARI

In *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969), this Court held in a divided opinion that the City of Jackson, Mississippi, had not denied Negroes equal protection of the laws when it decided to close the public pools operated by that City, rather than attempt to operate them on a desegregated basis. Unlike the facts in the case at bar, the City of Jackson, Mississippi, had been involved in extensive litigation concerning desegregating its public parks, auditoriums, golf courses, the City Zoo, and its public swimming pools. This Court held that since the pools were closed to all citizens of Jackson, both black and white, the City's action did not deny black citizens equal protection of the laws under the Fourteenth Amendment.

In the last portion of the majority opinion, Mr. Justice Black, discussed the possible application of the Thirteenth Amendment to this type of fact situation. He said:

> "Finally, some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment which freed the Negroes from slavery. The argument runs this way: The first Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552, 16 S.Ct. 1138, 1143, 41 L.Ed. 256 (1896), argued strongly that the purpose of the Thirteenth Amendment was not only to outlaw slavery but also all of its 'badges and incidents.' This broad reading of the amendment was affirmed in Jones v. Alfred H. Mayer Company, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a 'badge or incident' of slavery. Consequently, the argument seems to run, this Court should declare

that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in Jones v. Alfred H. Mayer Co. could empower Congress to outlaw 'badges of slavery.' The last sentence of the Amendment reads:

> 'Congress shall have power to enforce this article by appropriate legislation.'

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities." 403 U.S. at 226, 227, 91 S.Ct. at 1945, 1946.

It is respectfully submitted that Mr. Justice Black's analysis of the Thirteenth Amendment in *Palmer, supra,* applies with equal force to the facts of the case at bar.

The closing of West Drive prohibits vehicular access from the north to all motorists, be they black, yellow, red, white, or any other color, creed or race. It applies to all motorists regardless of where they might live or whether they own, lease or hold any property whatsoever. (Contrast with *Jennings v. Patterson,* 488 F.2d 436 (5th Cir.

1974), wherein the erection of a barricade on a public street deprived only black persons from the use thereof; the only white person inconvenienced by the barricade being offered private access to the closed street.)

The Sixth Circuit's majority opinion rested its conclusion that the closure of West Drive constituted a "badge of slavery" in violation of the Thirteenth Amendment and 42 U.S.C. §1982 upon its finding that the community to be benefited by the closing was and historically had been all white, while the territory to be burdened by the closing was predominantly black, and that the barrier was to be erected at the point of separation of these neighborhoods. It also found that the closing represented a unique step to protect this neighborhood from outside influences. (A56).

The majority opinion also held that there was "some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with the corresponding increase in the property values in Hein Park." (A56-A57). As has been noted previously in this petition, the district court in fact found only that there would be an increase in the property values in Hein Park as a result of the closing. He did not credit the testimony of the respondents' witness concerning an economic depreciation in the property value of the area north of West Drive. (A56).

The fact that the action of the City Council was an initial and unique attempt to utilize existing procedures prescribed by law for closing a street should not, without more, constitute proof of racially discriminatory intent; nor did the respondents' proof at trial indicate that the racial segregation that existed between the Hein Park neighborhood and the area to the north was in any way the result of action upon the part of the petitioners.

The location of the barrier at the northern end of West Drive was erected at that particular point, not because it represented the precise point of separation between the neighborhoods, but because it is the point where a major four-lane thoroughfare funnels into a two-lane residential street.

Unfortunately, the Court of Appeals majority opinion in its attempt to conduct the sensitive inquiry required by *Arlington Heights, supra,* went beyond the findings of the district court and substituted speculation and suspicion for proof.

Petitioners are keenly aware that this Court does not grant Certiorari merely to review the findings of fact of a Court of Appeals. Factual analysis, however, is critical in this case, since the majority opinion has stretched 42 U.S.C. §1982 and its underlying basis, the Thirteenth Amendment, into a new frontier.

The question left open by the Sixth Circuit majority opinion concerning whether racially discriminatory intent is a necessary element of a claim based on these sections has significant implications. The majority's opinion ignores the fact that aside from some evidence of disparate impact, there is no evidence in this record to support a finding of racially discriminatory motivation or intent.

The dissent after noting that the disparate impact is both racial and geographic in nature logically deduces that the impact is caused by the obvious distinction between residents and non-residents along West Drive. He also notes that the disparate impact results from motivations that have been held by this Court to constitute reasonable distinctions between the classes of residents and non-residents. *County Board of Arlington County, Virginia, et al. v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

While not addressing specifically the question of whether racially discriminatory intent is a necessary ingredient in a case involving the Thirteenth Amendment and 42 U.S.C. §1982 this Court in *Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), peripherally discussed the requirements of 42 U.S.C. §1982 and said "indeed, even the respondents seem to concede that, if Section 1982 'means what it says' - to use the words of the respondents' brief - then it must encompass every *racially motivated* refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing." 392 U.S. at 421, 422, 88 S.Ct. at 2194 (Emphasis added).

In addition, the *Jones* case, *supra*, notes that Congress intended Section 1 of the Civil Rights Act of 1866, which is the source of 42 U.S.C. §1982, to prohibit *all racially motivated* deprivations of the rights enumerated in the statute. . . 392 U.S. at 426, 88 S.Ct. at 2196. (Emphasis added to words racially motivated). Section 2 of the 1866 Act lends further credence to this position by imposing criminal sanctions upon anyone who under color of law, statute, ordinance, regulation, or custom, deprives someone of a right secured by the Act "*by reason of his color or race*" 14 Stat. 27. (Emphasis added).

Even the Sixth Circuit in its original opinion in this case indicated that a necessary element of the respondents' case under 42 U.S.C. §1982 was proof of racially discriminatory intent. *See*, 535 F.2d 976 at 979 (6th Cir. 1976). (A11).

In this case the Court of Appeals majority opinion has reversed the findings of the district court on nothing more than coincidence, innuendo, and suspicion. It refused to set forth any guidelines concerning what constitutes a "badge of slavery" because it was aware that

any fair, comprehensive listing of requirements would have excluded the present fact situation from its purview. All of the cases listed in the majority opinion as examples of past discriminatory practices are easily distinguishable from the facts surrounding this street closure, which applies its benefits and detriments totally without regard for the race, creed or color of any person.

Any possible adverse effects that flow from the closing adhere to all non-residents who hold property north of West Drive regardless of their race, creed or color. All citizens, regardless of their race, creed or color, may traverse through Hein Park by other routes or along the remaining areas of West Drive at any time. In contrast, all of the cases cited by the majority opinion involved attempts to exclude all Negroes, because of their race, from rights that were available to all white persons.

Surely the possibility that some black persons may feel increased hostility after the closing and commit acts of vandalism cannot constitute competent proof of racially discriminatory intent on the part of the City Council of Memphis, Tennessee.

In short, the City of Memphis through its Council has exercised its lawful authority to close streets for reasons which this Court has found in the past constitute valid distinctions between residents and non-residents. As a result of residential housing patterns, it appears that perhaps more black citizens will be inconvenienced by the street closing than white citizens. Having established that scenario, it is imperative that a court undertake a diligent factual inquiry into the motivations of the legislative body that precipitated this action. By omitting the requirement that a plaintiff prove that racially discriminatory intent was a motivating factor in the Council's decision, the Court of Appeals opinion creates unwarranted

conflict between the requirements of two vital sister sections of our Constitution. Perhaps, more importantly, it subjects legislative and administrative bodies to the risk of having their actions indiscriminately labeled "badges of slavery" without adequate guidelines or standards of proof. This case graphically illustrates the consequences of such a position.

CONCLUSION

Petitioners respectfully request the Court, for all the reasons set forth above, to grant Certiorari, to reverse the decision of the Sixth Circuit Court of Appeals below, to reinstate the judgment of the district court below, and to resolve the important question concerning the necessity for proof of racially discriminatory intent when a claim is based upon an alleged violation of the Thirteenth Amendment and 42 U.S.C. §1982.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
NO. C-74-208

N. T. GREEN, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, and SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor, et al,
Defendants.

ORDER ON MOTIONS TO DISMISS

(Filed October 4, 1974)

Plaintiffs allege that they are citizens of Memphis and that two civic clubs, Wilshire Park and Shankman Hill, also plaintiffs, are unincorporated associations of "similarly situated persons." They sue the City of Memphis, the City Council, and the Chairman of the City Council on the following asserted bases:

(1) 28 U.S.C. 1343(3) to redress the deprivation, under color of state legal action, of constitutionally secured personal and property rights;

(2) 42 U.S.C. 1982 to insure that all persons have same rights and enjoyments as those of white citizens;

(3) 28 U.S.C. 2201 for declaratory judgment. Specifically, plaintiffs complain about two specific actions of

the City Council and/or the Mayor in "striking from municipal budget . . . a $750,000 federal-state financed Community Center in plaintiffs' neighborhood," and "in closing through traffic access to West Drive between Jackson Avenue and North Parkway." They seek mandatory relief from the Court to correct these allegedly unconstitutional acts and violations of their civil rights.

Defendants have filed a motion to dismiss on the basis of asserted lack of jurisdiction in the Court, and because no substantial cause of action arising under the laws or Constitution is alleged. First attention is given to the prospective closing of West Drive.[1]

I. WEST DRIVE CLOSING AT NORTH END

It may be deemed to have been a moot issue relative to the closing of West Drive at its northern terminus, Jackson Avenue, since no actual impediment to passage at this point has been erected, except that a declaratory judgment as to the rights of the parties might be appropriate if the Court has jurisdiction of this cause of action and these parties for any purposes. 42 U.S.C. 1982[2] came into being after the Civil War to prohibit discrimination against negroes in the inheritance, purchase, sale, holding or conveying of property. *Hurd v. Hodge*, 334 U.S. 24 (1948); *Jones v. Mayer Co.*, 392 U.S. 409 (1968). These cases gave a broad construction to the language of the statute. Nowhere, however, has this language been

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1. At the hearing it was disclosed that West Drive had not actually been closed, but plaintiffs protest the resolution authorizing the closure at Jackson Avenue.

2. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

construed to confer property rights to Negroes *beyond* those which belong to white citizens. None of the plaintiffs on West Drive;[3] none are deprived of reasonable ingress and egress to their property; the street is not proposed to be closed to blacks and open to whites. In short, the effect of the proposed closing, whether wise or unwise, is the same upon whites as it is to blacks. *Palmer v. Thompson*, 403 U.S. 217 (1971). There is no facial discriminatory import to the resolution of closure, and there is no assertion that it will be implemented or administered in a racially discriminatory fashion or effect. Plaintiffs complain only that they will be denied access to West Drive from the north just as every other citizen will be. Attached to this Order is a city map showing the location of the area in controversy. It shows that by a very short detour to the east or west via Charles or Cypress Drive, one may proceed southwardly from Jackson Avenue towards North Parkway via a portion of West Drive, and that within approximately one quarter to a half mile east or west of West Drive there are "through streets"[4] providing non-stop direct routes from Jackson to North Parkway without an intervening stop or bends or curves as on West Drive. See *Mandell v. Commissioners of Bernalillo Co.*, 99 P(2d) 108, 4 NM 109 (.....). Plaintiffs also contend that there was no "public notice" of the action taken with regard to the resolution. Regardless of this contention, which the Court does not reach, this attempted attack upon the right to close the access to West Drive at one end of this approximately one-half mile long road is unavailing. Plaintiffs as "citizens" who do not assert

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3. The nearest named plaintiff lives, according to the City Directory, many blocks from West Drive. A number of others claiming to be interested in a letter to the Court live at least four blocks away.

4. Trezevent and University.

themselves to be contiguous or adjacent property owners, have no such public property right in the entry to a street, which is not alleged to be essential to them for any purpose, to petition this Court to require it to remain open for their possible convenience. Plaintiffs have no standing for this purpose. Plaintiffs have not been denied their interstate right to travel, or their "equal utilization, without discrimination upon the basis of race, of any public facility "or to travel freely upon *interstate* highways or other instrumentalities as in *United States v. Guest*, 383 U.S. 745, 757 (1966). This is not a case of asserted discrimination against blacks in deprivation of necessary public instrumentalities, such as utilities or paved streets, or of unequal treatment in the furnishing of these essential instrumentalities. Plaintiffs have failed to state a cause of action with respect to the purported West Drive closure, as and if effectuated, whether on the basis of racial discrimination or on the basis of unequal protection of rights. "Subject to the limitations contained in the Constitution . . . the power of a state to vacate streets or other public ways within its borders is plenary and absolute, and this power may be exercised by the state legislature or may be delegated to a municipal corporation. . . ." 64 C.J.S., *Municipal Corporations*, Sec. 1665. See *Cash & Carry Lbr. Co. v. Olgiatti*, 215 Tenn. 287, 385 S.W.2d 115 (1964).

Plaintiffs have no constitutional property rights in continued access to West Drive under the facts asserted or on the basis asserted in the complaint. They have no standing as affected property owners on the street to due process notice and hearing.

"In the absence of an allegation of fraud or a manifest abuse of discretion, courts will not inquire into the motives of municipalities for vacating a municipal street." *Sweetwater Valley Mem. Park v. City of Sweetwater*, 372

S.W.2d 168 (Tenn. 1963) cited in *Cash & Carry Lbr. Co. v. Olgiatti, supra,* 385 S.W.2d 117.

Whether or not the state or local statutory procedure in bringing about the alleged impending closure was followed is a state court matter not a federal question concerning which this Court has jurisdiction. See *Byington v. Bass,* 11 Tenn. App. 569, 572 (1930) holding that the general public, not relying upon subdivision representations, have no such property right as claimed by plaintiffs in a street similar to West Drive.[5]

II. STRIKING COMMUNITY CENTER BUDGET ITEM

Plaintiffs ask that the Court "by mandatory orders . . . specifically provide fundamental services and allocate governmental funds (a) to construct and federally finance or otherwise pay for a $750,000 community center in plaintiffs' neighborhood. . ." Again, with reference to the city map hereinabove made reference to, the Court notes that within the area described that plaintiffs "as a class" reside, it is noted that there are three city parks of substantial size and another community facility (Klondike) lying just west of Watkins.[6] Dave Wells Community Center is also situated in North Memphis less than a mile from the western boundary of the area described as that in which plaintiffs assert a special interest. Plaintiffs assert that defendants in February "unlawfully prevented, and . . . continue to prevent the budgeting, planning, funding, and

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5. Plaintiff Greene's amended complaint goes into detail with regard to notice and a public hearing prior to the closure of West Drive, though he was dissatisfied with the conclusion the Memphis City Council reached.

6. University Park is about one-half mile from plaintiff Greene's residence; Gooch Park is little more; and May Park is within a mile.

construction of a $750,000 federal and state financed community center." They also claim that their civil rights and property rights and their "property-linked benefits and enjoyments" are damaged and deprived.

Apparently, by inference, plaintiffs claim that the defendants' failure to construct the community center equates to deprival of "basic human necessities," and deprivation of equal protection. Plaintiffs quote from *Beal v. Lindsay,* citation unknown, that availability of distant parks is not a consideration. The location of other nearby parks and recreation or community facilities is a matter of proper consideration and the Court takes judicial notice of the location of them on the attached map.

Nowhere in the complaint is it stated that the City's alleged failure to act was discriminatory to blacks, or to the poor, or how this amounted to a violation of equal protection. Assertion of not budgeting, planning, funding, or constructing a community center without any assertion of pertinent circumstances as to comparative or unequal treatment with relation to other citizens of the larger community does not state a cause of action for racial discrimination nor of a constitutional violation. *Gautveaux v. City of Chicago,* 480 F.2d 210 (7th Cir. 1973), cited by plaintiffs, relates to the refusal of Chicago authorities to locate public housing projects in white neighborhoods. There is simply no assertion in this complaint relating to housing project discrimination of the type involved in that case. *Feliciano v. Romney,* 363 F.Supp. 656 (S.D. N.Y. 1973) is similarly inapplicable as dealing with alleged failure under a number of federal statutes to relocate after eviction proceedings had been instituted in an area of Harlem.[7]

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7. *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968) is similarly inapplicable. Plaintiff also

(Continued on following page)

The determination whether to build and when or where to build a community center is essentially a political discretionary decision of City of Memphis officials. No allegation is made to indicate any constitutional deprivation in the decision made with respect to February, 1974. "Federal Courts are reluctant to enter the field of local government operations." *Hawkins v. Shaw,* 461 F.2d 1173. Compare *Coleman v. Aycock,* 304 F.Supp. 132 (N.D. Miss. 1969) which ordered racial desegregation of public facilities but held no need for the court to interfere with municipal operations relating to fire hydrants, paving streets, police protection, drainage, and the like. "The governing authorities of a municipality in the provision of public services and the operation of public facilities are entitled to the widest discretion, and the Court should not undertake to control or interfere with the exercise of such discretion in the absence of bad faith or abuse." *Supra,* 304 F.Supp. 146. No allegation of bad faith or gross abuse of discretion is made in this complaint. Indeed, Greene's amended complaint sets out in detail that the Council and defendants heard their contentions about the need for a community center in the Vollentine-Evergreen area and declined, after discussion and consideration, to insert that item in this year's budget. (There is in the amended complaint admittedly no basis for the conclusion in the original complaint that such community center would be federally and state financed.) A court does not ordinarily look

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Footnote continued—

relies on *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971); en banc, 461 F.2d 1171 (1972) which dealt with discrimination in service of necessities to a majority black population in a Mississippi town that had historically deprived them of necessities such as paved streets, street lights, sanitary sewers, water mains or drainage and fire hydrants. That case dealt "only with the town of Shaw, Mississippi, and the facts as developed in the record." 461 F.2d 1173. The Court noted a significant change in the situation with election of a black councilman. Memphis had at the time the suit was brought three black councilmen.

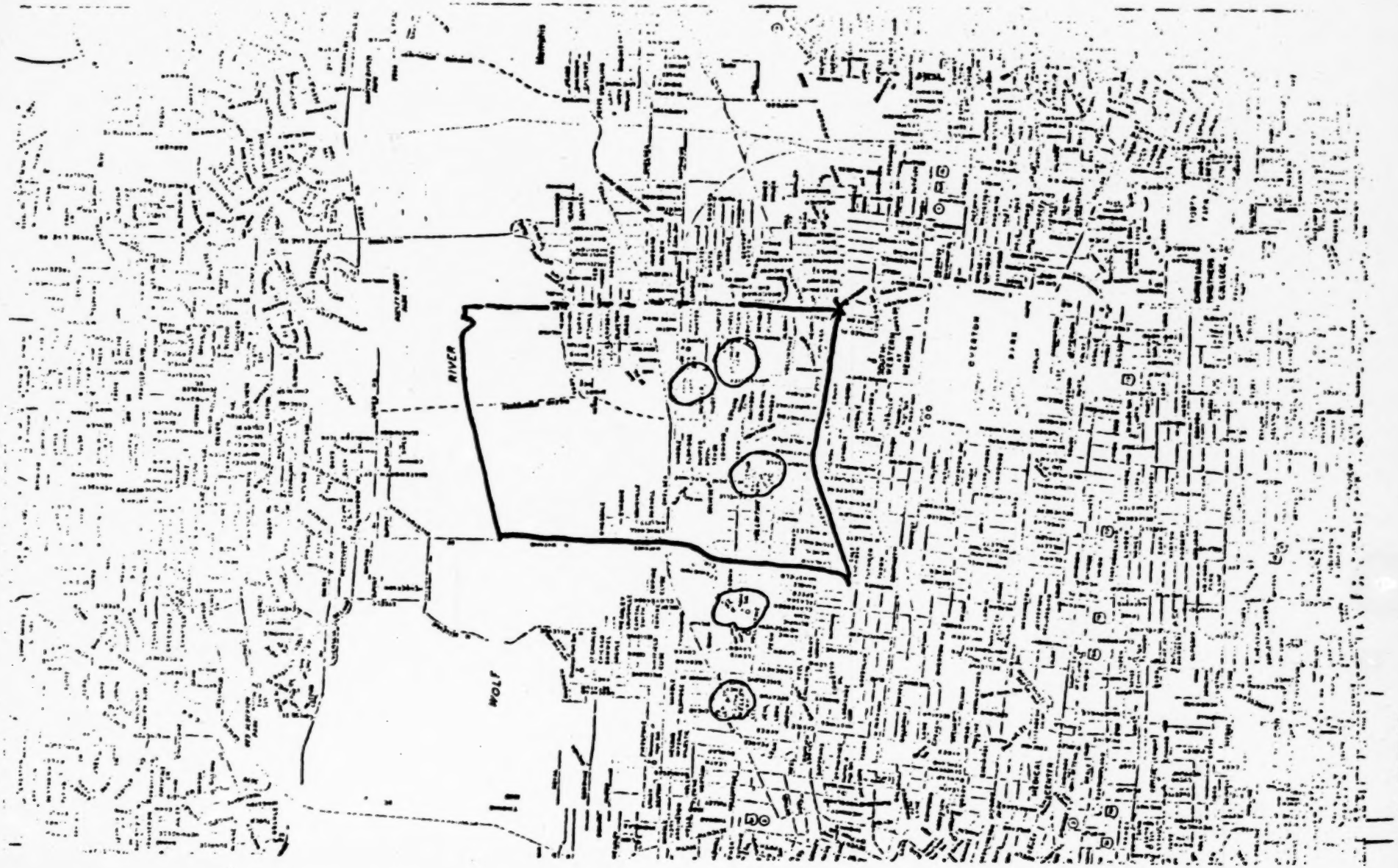
to the motives of the legislature or municipal council in adopting a law or ordinance of the kind under consideration. *Palmer v. Thompson, supra.*

Under any circumstances, however, the Court does not have the authority to order by way of mandamus defendants to do any act, non-ministerial or discretionary in its nature, such as requiring the City or defendants to plan and construct a community center. *Tannery Bass Anglers Sportsman's Society v. Scholze,* 329 F.Supp. 339, 350 (E.D. Tenn. 1971). This is not to say that the Court may not in a proper case order certain acts be done or not to be done to effect an end to prohibited discrimination, or to provide due process or equal protection in appropriate situations. The complaint or amended complaint fails to state a cause of action and should be dismissed except as to paragraph 11, Part II (page 15) of the amended complaint. This one section asserts that the actions of the City since 1970 in building community centers has demonstrated racial bias or prejudice. While the Court denies the relief requested in the form originally sought, it will proceed in this cause on the sole issue raised as to whether defendants since 1970 have, in fact, demonstrated racial bias in construction of community centers. Plaintiffs may be able to prove a set of facts in support of their claim (if it is "ripe" and if they have standing) which may entitle them to some relief. There is no constitutional notice or hearing issue, however, before the Court.

Except to the extent indicated in the last paragraph above, defendants' motion to dismiss is granted.

This 4th day of October, 1974.

/s/ Harry W. Wellford
United States District Court
Judge


RIVER
WOLF

N. T. GREENE, et al.,
Plaintiffs-Appellants,

v.

CITY OF MEMPHIS, a Municipal Corporation, et al.,
Defendants-Appellees.

No. 75-1339.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 13, 1976.

Decided May 13, 1976.

Action was instituted against city and various of its officials for alleged unlawful closing of street. The United States District Court for the Western District of Tennessee, Western Division, Harry W. Wellford, J., dismissed complaint for failure to state a claim, and one plaintiff appealed. The Court of Appeals, John W. Peck, Circuit Judge, held that complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council.

Reversed and remanded.

1. Civil Rights (Key) 13.12(3)

Complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was

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sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council. 42 U.S.C.A. §§ 1982, 1983.

2. Federal Civil Procedure (Key) 674

That individual plaintiff failed to specifically allege a claim under statute covering deprivation of civil rights did not operate to preclude him from recovering on that claim in event allegations showed and proof supported claim. 42 U.S.C.A. § 1983.

3. Civil Rights (Key) 13.13(1)

To establish that closing of street by city officials conferred certain benefits, to wit, privacy and quiet of exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods, plaintiff was required to prove that city officials conferred closed street on residents of area because of their color; he was also required to prove racial motivation, intent or purpose, in absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. 42 U.S.C.A. §§ 1982, 1983.

Raymond P. Gibbs, Murfreesboro, Tenn., for plaintiffs-appellants.

Joseph B. Dailey, Asst. City Atty., Charles V. Holmes, Memphis, Tenn., for defendants-appellees.

Before PHILLIPS, Chief Judge, and PECK and Lively, Circuit Judges.

JOHN W. PECK, Circuit Judge.

Plaintiffs Greene, Goldberger, Taylor, Wilshire Park Civic Club, and Shankman Hill Civic Club charged in

their district court complaint that defendants-appellees City of Memphis, its Mayor, its Council, and its Council Chairman unlawfully closed West Drive to through traffic and unlawfully deleted from the municipal budget a joint-funded $750,000 community center. By amended complaint, Greene charged that City had since 1970 located seven community centers on racial bases and closed West Drive on racial bases. The district court granted appellees' motion to dismiss, for failure to state a claim, Fed.R.Civ.P. 12(b)(6)[1] the West Drive and budget deletion claims, and Greene "petition[ed] for [an] interlocutory appeal." Prior to the district court's certifying such petition, the district court proceeded to a non-jury trial of the community center location claim, which was dismissed with prejudice at the conclusion of Greene's proof. Greene thereafter filed a notice of appeal.

On appeal, Greene[2] claims that the district court erred in granting the motion to dismiss. We agree. Axiomatically,

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1. Although appellees moved to dismiss also for lack of jurisdiction over the subject matter, Fed.R.Civ.P. 12(b)(1), and although the district court simply granted appellees' "motion to dismiss," subject matter jurisdiction under 28 U.S.C. § 1343(3) would have attached if a 42 U.S.C. § 1983 claim were stated. *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976); *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975). Likewise, if Greene had stated a 42 U.S.C. § 1982 claim, there was subject matter jurisdiction under 28 U.S.C. § 1343(4). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n. 1, 88 S.Ct. 2186, 2189 n. 1, 20 L.Ed.2d 1189, 1192 n. 1; *Jennings v. Patterson*, 460 F.2d 1021, 1022 (5th Cir. 1972); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1387 (M.D.N.C.1972). It follows that the district court dismissal was for failure to state a claim, Fed.R.Civ.P. 12(b)(6).

2. Although the court of appeals docket sheet styles Greene, Goldberger, Taylor, Wilshire Park Civic Club and Shankman Hill Civic Club as plaintiffs-appellants, "[p]laintiff, N. T. Greene," through his attorney, filed the petition for interlocutory appeal and notice of appeal. Similarly, the appellate brief refers to "appellant." The use of the singular apparently is significant in light of a letter in the record indicating the decision of a "Com-

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> "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L. Ed.2d 90, 96 (1974), quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

Scheuer emphasized that

> "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96.

Accord, *Dunlap v. State of Tennessee,* 514 F.2d 130, 133 (6th Cir. 1975).

[1] We view Greene as having stated claims under 42 U.S.C. § 1982 and 42 U.S.C. § 1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright,* 532 F.2d 552, 553 (6th Cir., filed March 23, 1976), citing *Scheuer, supra,* 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive

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Footnote continued—
mittee to Re-open West Drive" to "separate" its "petition" from Greene's "petition." Because the complaint prays for equitable relief ordering the city officials to keep West Drive open, rather than for damages, whether there is one or more than one appellant is for present purposes insignificant. See *Craft v. Memphis Light, Gas & Water Division,* 534 F.2d 684, 685-687 (6th Cir., filed April 12, 1976).

that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. Though we have found no section 1982 case on-point, the liberal construction that courts have afforded section 1982 buttresses our conclusion that Greene has stated a section 1982 claim. See, e. g., *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974); *Jennings v. Patterson,* 460 F.2d 1021 (5th Cir. 1972), 488 F.2d 436, 442 (5th Cir. 1974); *Battle v. Dayton-Hudson Corp.,* 399 F.Supp. 900, 905 (D.Minn.1975).

[2] That Greene failed to specifically allege a section 1983[3] claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e. g., *Janke Const. Co. v. Vulcan Materials Co.,* 527 F.2d 772, 776-77 (7th Cir. 1976), *aff'g* 386 F.Supp. 687, 692 n. 3 (W.D.Wis.1974); *Ailshire v. Darnell,* 508 F.2d 526, 528 (8th Cir. 1974); *Parr v. Great Lakes Express Co.,* 484 F.2d 767, 773 (7th Cir. 1973); *United States v. Martin,* 267 F.2d 764, 771 (10th Cir. 1958); *Dotschay v. National Mut. Ins. Co.,* 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those

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3. Neither the complaint nor amended complaint mentions section 1983, but both allege jurisdiction through 28 U.S.C. § 1343 (3), the jurisdictional counterpart of section 1983. The amended complaint also generally tracks the language of section 1983 in alleging that

> "[d]efendant's actions deprived plaintiff and others of their property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment. . . ."

"person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

Of course, no section 1983 claim is stated against the City of Memphis or its Council. See *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976).

The district court, in dismissing, relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed. 2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), which sustained closing of municipal swimming pools against equal protection challenges because the closings prevented whites and blacks equally from utilizing municipal swimming pools. Accord, *Mahaley v. Cuyahoga Metropolitan Housing Auth.*, 500 F.2d 1087, 1092-93 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975). Similarly, the closing of West Drive, as the district court noted, affects Greene "just [like] every other citizen," white and black, by "deny[ing] access to West Drive from the north." Yet, as noted above, the complaints also reasonably allege that the city has conferred certain benefits on white residents of West Drive, though refusing to confer those benefits on similarly situated black neighborhoods, thereby falling within the *Palmer* caveat that

> "[s]hould citizens of . . . [any] city be able to establish in court that public, tax-supported swimming pools are being denied to one group *because* of color and supplied to another, they will be entitled to relief." 403 U.S. at 227, 91 S.Ct. at 1946, 29 L.Ed.2d at 446 (emphasis supplied).

Similarly, the complaint falls within *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), 461 F.2d 1171 (5th

Cir. 1972) (*en banc*), which condemned the conferral of municipal services on racial bases.

We recognize that the allegations nowise approach the egregiousness of the facts found in *Town of Shaw,* and endorse the *Town of Shaw* caveat that it is not to be

> "impl[ied] or suggest[ed] that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record." 461 F.2d at 1173.

See *Towns v. Beame,* 386 F.Supp. 470 (S.D.N.Y.1974) (even assuming that the closing of eight fire companies had disproportionate impact on racial minority response areas, no "sufficiently serious" question of equal protection to justify preliminary injunction, where fire department has satisfactorily rebutted plaintiffs' prima facie case of racial discrimination by proving non-racial rationale for closings).

[3] To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. Compare *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968), and *Kelly v. Romney,* 316 F.Supp. 840, 844 (S.D.Ohio 1970), with *Town of Shaw, supra.* See also *Bronson v. Board of Educ.,* 525 F.2d 344, 347-49 (6th Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). See *Citizens Comm. for Faraday Wood v. Lindsay,* 507 F.2d 1065, 1070 n. 11, 1074 n. 6 (2d Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1679, 44 L.Ed.2d 102 (1975), and accompanying text. In *Palmer,* the closings left whites and blacks alike without muncipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

In reversing, we, of course,

> "intimate no evaluation whatever as to the merits of [Greene's] claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of [his] respective complaints, [Greene was] entitled to have them judically resolved."

Scheuer, supra, 416 U.S. at 250, 94 S.Ct. at 1693, 40 L.Ed.2d at 105.

Reversed and remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
NO. C-74-208

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, EDWIN OWENS,
CAROLYN BURSE,
Intervenors,

vs.

CITY OF MEMPHIS, A Municipal Corporation, WYETH CHANDLER, as Mayor, THE COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER, as Chairman of the Council of the City of Memphis,
Defendants.

MEMORANDUM DECISION

(Filed June 21, 1978)

This is a cause of action which was filed to prevent the implementation of the action of the defendants as officials of the municipality, the City of Memphis, Tennessee, from effectively closing a residential street to the public.

The case was dismissed previously by another Judge of this District upon a motion to dismiss for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Sixth Circuit reversed and remanded because it found that the original plaintiff Greene did state claims upon which relief might be granted. *Greene v. City of Memphis*, 535 F.2d 976 (C.A. 6 1976).

In remanding this case, the Court of Appeals stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property subject to having the city confer the dead-end street benefit on their property. 535 F.2d 978 . . . . We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d 978, 79.

After the remand the case was transferred to the undersigned Judge of this District and the original attorney for the plaintiffs was allowed to withdraw on his own motion. Considerable delay was encountered before new counsel was obtained. Intervention was allowed by three additional plaintiffs.[1]

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1. At the trial on remand the only original plaintiff who was still a party was N. T. Greene, who acted *pro se.* A. C. Wharton, Jr. of Memphis Area Legal Services ably represented the intervenors.

Motions to amend the complaint were allowed to allege the failure of the defendants to provide sidewalks on the street in question, the existence of a class action, and pendent jurisdiction of this Court to grant relief because the defendants did not comply with state laws and municipal ordinances and regulations.

A non-jury trial was held and this Memorandum Decision sets forth the findings of facts and conclusions of law of that trial.

Before setting forth the more specific findings of facts, the basic factual information must be stated.

The case pertains to a subdivision in the heart of Memphis, Tennessee, known as Hein Park. It was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

On July 9, 1973, an application was made by members of the Hein Park Civic Association for the closing of a portion of West Drive just south of its intersection with Jackson Avenue in Memphis, Tennessee (Trial Exhibit 13). The application states that the reasons for the requested closure are to: "1. Reduce flow of traffic using subdivision streets, 2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, 3. Reduce 'traffic pollution' in a residential area, e.g. noise, litter, interuption (sic) of community living." On the printed face of the application it is provided that "All owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the Procedure for Filing Street or Alley Closings and includes this same requirement. It was stipulated by counsel in the pretrial order that the purported owners of the two lots abutting the 25-foot strip of West Drive sought to be closed, signed the application submitted to the Planning Commission (Pre-Trial Order, page 6).

The Procedures listed on the back of the application also provide that additional owners may sign the application. The application contains the purported signatures of the owners of 26 lots on West Drive in addition to the two lots which are involved in the closing.

Sections 4 and 6 provide that the names of abutting property owners be shown on the plat that must be filed with the application. An examination of the plat filed with the application reveals that only the names of the owners of lots 53 and 77 along West Drive appear. Other lots along West Drive are denoted on the plat only by number.

The Planning Commission staff received a letter from Mrs. Sara F. Terry, a resident of West Drive, indicating her opposition to the proposed closing of West Drive at Jackson Avenue. Mrs. Terry indicated that she and her husband, Fred, had purchased the property at 732 West Drive and had lived there since April 28, 1973. Mrs. Terry testified at the hearing in this Court that she had been approached to sign the application by someone in the neighborhood and that she was told that the reason the closure was being sought was to eliminate "undesirable traffic." Mrs. Terry did not sign the application. She appeared before the Memphis City Council on January 29, 1974, and spoke in opposition to the resolution closing a portion of West Drive.

The staff of the Planning Commission interprets the phrase "owners abutting the thoroughfare to be closed" in its requirements for application to close streets or alleys to mean only those persons whose property physically touches some part of the street or alley that is to be closed to the public use. The property, once closed, is deeded by quit-claim deeds to these abutting owners.

Upon receipt of the application the Planning Commission staff followed the usual procedure and communicated with various departments of the City Government in an attempt to discern their feelings regarding the closure.

Memphis Light, Gas, and Water Division offered no objection to the closure provided an easement was retained for existing and future utility services. An examination of the resolution passed by the City Council indicates this condition was satisfied (T.E. 1, 5, 4, and 10).

South Central Bell Telephone System had no objection to the closing (T.E. 9).

The Fire Department indicated it could not approve the closure unless there was the 24-foot clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker (T.E. 11, 4). The resolution passed by the City Council provides for this to be done (T.E. 1).

A memorandum from the Director of the Memphis Police Department to a Planning Assistant of the Planning Commission indicated that police response time would be inhibited, but he believed that "the residents of the [West Drive] area are competent to decide which problem they prefer to live with." (T.E. 6).

The Sanitation Department sent three separate written communications to the Planning Commission regarding this closure. First they objected to the closure, then they offered no objection provided a turn-around was provided, and finally, they reported having no objection (T.E. 7, 8, 12). Mr. Paul Goldstein of the Planning Commission staff testified that he thought a turn-around was incorporated in the final plan; however, neither the specifications nor the resolution refer to a turn-around (T.E. 1, 13). Presumably, sanitation trucks will be allowed to utilize the same 24-foot clearance that is available to emergency vehicles for passage through the area.

There is no written communication from the Traffic Engineering Department after the time this application

was filed in July 1973. The file does contain an earlier set of writings from that department (collective T.E. 14). Mr. Goldstein explained that departmental work done prior to an application being filed may be part of the pre-application process.

It appears from the Traffic Engineering file that was forwarded to the Planning Commission that the department had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets in the subdivision. The then Traffic Engineer, Mr. Robert Fosnaugh, advised that, "From a practical standpoint . . . it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby achieving most of the original objective of the proposal." (Collective T.E. 14, page 3). A cover letter that accompanied the application to close West Drive at Jackson Avenue filed on July 9, 1973, indicates that it was upon Mr. Fosnaugh's recommendation and advice that the application to close a portion of West Drive was made (T.E. 13).

The Memphis and Shelby County Planning Commission voted at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved, with conditions relating to the Memphis Light, Gas and Water facilities and the Fire Department that have been previously mentioned. A copy of the letter informing the City Attorney of this action and requesting him to present the matter to the City Council was sent to Mr. and Mrs. Fred H. Terry, the objectors on West Drive (T.E. 4).

The matter came on for hearing before the City Council on January 29, 1974. At the City Council meeting after presentation of the proposal by Mr. Robert Miller, Executive Director of the Planning Commission, four per-

sons spoke in favor of the resolution and seven persons spoke in opposition, including Mrs. Fred H. Terry and the plaintiff N. T. Greene. Each side was given 15 minutes to present its views.

Both during and after the speakers' presentations members of the City Council asked questions concerning various aspects of the proposal and debated among themselves the merits and demerits of the proposal. After discussion, a vote was taken on the resolution to close a portion of West Drive with the certain conditions previously mentioned. The resolution passed (T.E. 26, 1).

On February 5, 1974, the City Council reconsidered the closure and again voted to close this portion of West Drive (T.E. 27, 2). The next week the City Council heard four speakers on the question of re-opening West Drive; however, no vote was taken, since the item was not on the agenda other than as a discussion item (T.E. 28).

On February 26, 1974, a resolution regarding the re-opening of West Drive was held over until March 5, 1974 (T.E. 29). On March 5, 1974, a hearing was held on a resolution that sought to re-open West Drive. There were nine speakers in favor of the re-opening, including plaintiff N. T. Greene. Two persons spoke in favor of keeping the street closed. The resolution regarding the re-opening of West Drive was voted on by the City Council and failed to pass (T.E. 30, 31).

When preparations for the hearing of this case were being made, city officials discovered an oversight in the earlier proceedings. Therefore, on January 31, 1978, the City Council passed a resolution correcting the legal description contained in the earlier resolution. Plaintiff, N. T. Greene, and Mr. A. C. Wharton, attorney for the intervening plaintiffs, spoke in opposition to this change. The

legal description contained in the 1974 resolution covered only the western half of the proposed closure, which was to be deeded to the abutting owner of lot 53 north. After amendment, the legal description contained in the resolution matches the area of West Drive that is to be closed according to the plans submitted by the applicant's engineer (T.E. 3, 41, 13).

Plaintiff N. T. Greene testified at the trial in this Court that the closure would compound the multitude of negative experiences that he has encountered as a black person. He complained that the closure would prevent convenient vehicular access to various facilities contained in Overton Park and would cause him, his family and neighbors psychological and emotional damage. His home is located on Terry Circle in Memphis, Tennessee, which is northwest from the intersection of West Drive and Jackson Avenue (T.E. 22). Insofar as his use of West Drive to and from his residence, the closure would cause him no actual inconvenience. He also complained of the fact that there are no sidewalks, curbs, or gutters along any portion of West Drive, a fact stipulated to by counsel (Pre-Trial Order, page 6).

Mrs. Elnora Priest Cross, an intervening plaintiff, testified that she would like to be able to go through West Drive. She has a friend who works at the home of someone who lives on West Drive and contacts her in the event of an emergency.[2] Mrs. Cross lives on Smith Avenue, which is a dead-end street in north Memphis (T.E. 22).

Mr. Edwin Owens, another intervening plaintiff, testified that he does not wish to have West Drive closed, nor does he wish the street that he lives on to be closed.

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2. Mrs. Cross will still be able to reach her friend; however, she will be inconvenienced by having to use a different route.

He is presently residing in another area of Memphis known as Frayser (T.E. 22). His chief complaints against the city government arise from conditions which existed at his previous address on Bellevue. They center around the fact that garbage trucks used to pass down the street emitting noxious odors on the way to the dump. He has also had to step off of buses into mud on some occasions because of a lack of sidewalks. These matters occurred in parts of Memphis other than West Drive. He does not know of a black neighborhood that has applied to have a street closed.

Mr. Harrell Moore, a licensed real estate broker for 17 years, testified that it was a benefit to residents to live on a closed street. He felt that the closing of West Drive would create a "utopian community." However, in his expert opinion there would not be a decrease in value experienced by the property owners located to the north of West Drive because of the closure.

Dr. Marvin Feit, an assistant professor at the University of Tennessee School of Social Work, testified that it was his opinion that closing West Drive would result in negative consequences in the form of hostility towards the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. He also was of the opinion that the closure would result in more disgruntled drivers.

Mr. Calvin Woods, Jr. indicated that he was opposed to the closure of West Drive because he felt that it would cause the traffic to be shifted over to his street, which is East Drive, north of Jackson.

Mr. Robert Miller, the Executive Director of the Planning Commission staff, testified in this cause that the motive of the Planning Commission staff in recommending the

closure of West Drive was to provide the residents of that street with a more tranquil neighborhood. He also testified that in his opinion the southbound traffic that would be prohibited by the closure would not be greatly inconvenienced by the closure since one block to the east there is a street, Trezevant, that gives straight access all the way to South Memphis and the State of Mississippi, and several blocks to the west there are University and McLean Streets, which are major thoroughfares offering additional access to southbound traffic to the nearby Overton Park and Snowden School and other more remote attractions south and west of Hein Park.

Mr. Paul Goldstein, a Planning Assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closings and making a field study of the area under scrutiny.

He explained that a document entitled "West Drive Street Closure" contained in the file was not an official document of the Planning Commission (T.E. 21). The document states in part on page 2, number 4, "As required on the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are handwritten above the typewritten word "affected" which has been crossed out.

Mr. Goldstein testified that these were the notes of Mr. Jerry Cook, an employee of the Planning Commission who was not a part of the street and alley closing section of the Planning Commission but rather was in the zoning section. He had been asked to attend a meeting concerning

West Drive that Mr. Goldstein could not attend and had prepared the notes as a result of that new assignment. He noted in his testimony that the official application does not require the signatures of "affected" owners. It only requires the "abutting" owners to sign (T.E. 13).

Mr. Goldstein's testimony reflects that the City of Memphis has on other occasions received and granted requests from residents of black neighborhoods to have streets or alleys closed. These are summarized below. However, it is noted that none of these involved closing a street for the purpose of stopping through traffic.

On July 3, 1973, six days prior to the application filing date in the West Drive case, the City Council closed a small portion of an alley located between East McLemore Avenue and Stafford Avenue, which is a black neighborhood in Memphis, Tennessee, thereby creating a dead end to the alley. The applicant was the Union Valley Baptist Church, acting through its black pastor. The church owned the property on both sides of the alley that touched the portion of the same that was to be closed, and only a representative of the church signed the application. None of the other owners along the alley, whose access to East McLemore by this route would be terminated, signed the application. The abutting owner agreed to pay $262.00 for a quit claim deed to the property involved. The application submitted states that the reason for the requested closure was to allow expansion of a church building by joining two separate parcels owned by the church into one larger parcel of land.

A similar application was received to close a portion of an alley bordered on both sides by the Vance Avenue Church of Christ. The trustees of the church are the only persons who signed the application. None of the other owners along the alley or across Vance have signed

the application. The area is a black neighborhood. The application states that the reason for the closure is that the "Church desires to improve lot to east of church structure and the subject portion of present alley as off-street parking facility." (T.E. 36). The Planning Commission file reflects that the Planning Commission approved the closure on July 3, 1974, with certain conditions relating to utility and telephone easements and Fire Department access. What action, if any, was taken by the City Council is not contained in the file.

In June of 1971, LeMoyne-Owen College, a black institution of higher learning in Memphis, applied for the closing of a portion of Louisa Street north of Saxon Avenue. The application reflects that the closure was essential to the completion of a building project and to the best use of the area. The college owned the property on both sides of the requested closure. Mrs. Eva Payne, whose property touched the closure at one corner, also joined in the application by a subsequent letter. The Planning Commission approved the closure in August of 1971 conditioned upon easements being provided or reserved for sanitary sewers and Memphis Light, Gas and Water facilities. On August 17, 1971, the City Council approved the closing by a resolution containing the above conditions (T.E. 33).

In two cases one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic (T.E. 34, 37). The applications, made in 1968 and 1972 respectively, contain the signatures of all persons who abut along the portions of street which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are black neighborhoods. The files reflect that the Planning

Commission approved both closures. On January 30, 1973, a resolution passed by the City Council approved the closure of Ruth Street and states that the abutting owners have agreed to pay $1,200.00 for the closing. The Benton Street file does not reveal any action taken by the City Council.

CONCLUSIONS OF LAW

As heretofore noted the Court of Appeals in its remand opinion directed that the issues to be considered included whether or not "the closing of West Drive left certain white residents with the privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street." Upon a consideration of the facts established, this Court concludes that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The Court of Appeals remand opinion also stated:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of the color, he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

After the remand opinion of the Court of Appeals in the case, the Supreme Court of the United States has spoken to this topic in the case of *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (Jan. 11, 1977). In doing so the Court explained the significance of "racially disproportionate impact" upon the standard of racial motivation and intent which is required to prove a constitutional violation.

The Supreme Court opinion stated in part:

> Our decision last Term in *Washington v. Davis,* 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . .
>
> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

The opinion also noted that the discriminatory purpose might be shown when a clear pattern of discrimination, unexplainable on grounds other than race, emerges from the effect of the state action even when the legislation ap-

pears neutral on its face. When the pattern is not stark (egregious), a court must look to other evidence.

On pages 267 and 268 the opinion sets forth several evidentiary sources for determining the issue of intent: (1) The historical background of the legislative decision, particularly if it reveals a series of official actions taken for invidious purposes. (2) The specific sequence of events leading up to the challenged decision. (3) Departures from the normal procedural sequence. (4) Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. (5) The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meeting, or reports. The list is not intended to be exhaustive.

This Court concludes that the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial

discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

Furthermore, the Court of Appeals remand opinion noted that the allegations of the complaint in this case in nowise approached the egregiousness of the facts in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (C.A. 5 1971), 461 F.2d 1171 (C.A. 5 1972) (*en banc*). In doing so the Court of Appeals remand opinion also endorsed the caveat that every disparity of services between citizens of a city does not create a right of access to federal courts for redress. 535 F.2d at page 979.

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

As heretofore noted, one of the evidentiary sources to establish discriminatory intent referred to in *Arlington Heights* was departures from the normal procedures.

In this case counsel for the intervening plaintiffs has urged that departures from the standard procedures not only establish discriminatory intent, but also the departure from normal procedures and the normal procedures which were followed did not afford the plaintiffs and the members of their class minimal procedural due process; in that they were given no notice of the hearing, they were not provided a meaningful hearing, and the processes followed in street closing are not based upon clear standards. This Court concludes that there were not significant departures from normal procedures and that there was not a denial of due process based upon lack of notice and a meaningful hearing.

With regard to the lack of clear standards in street closing proceedings, the Court notes that alley and street closings are infrequent and unusual, and each one presents different factors to be taken into consideration by the city officials. As the Supreme Court noted in *Arlington Heights,* "In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits, absent a showing of arbitrariness or intentionality." In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

In summary this Court concludes that the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority. This includes the relief sought in an amendment to the complaint which sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. There was no proof which would authorize this Court to intervene on a racial disparity basis and this Court is not the proper forum to seek to enforce the ordinance of the City of Memphis pertaining to the installation of curbs, gutters and sidewalks in the absence of a constitutional deprivation in the wording or application of the ordinances.

Another post remand amendment to the complaint asks that this Court exercise pendent jurisdiction in order

to require the defendants to correct the wrongs caused by the failure of the defendants to follow their own procedures and the law of Tennessee. In this regard the plaintiffs contend that the defendants used a definition of "abutting owner" that was too narrow and that the defendants abused their discretion and were guilty of fraud in closing West Drive, which is prohibited under the law of Tennessee as announced in *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 SW 2d 168 (1963). This Court concludes that the evidence does not support a recovery under these or any other theory under the law of Tennessee.

For the reasons set forth above the Clerk of this Court is directed to enter a Judgment for the defendants.

ENTER: This 21 day of June 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

Nos. 78-1527-8

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N. T. GREENE,
Plaintiff-Appellant (78-1527),

ELNORA PRIEST CROSS, EDWIN OWEN and CAROLYN BURSE (78-1528),
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS and EDWIN MCBRAYER,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed November 1, 1979.

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which KEITH, Circuit Judge, joined. CELEBREZZE, Circuit Judge (pp. 21-28), filed a separate dissenting opinion.

ENGEL, Circuit Judge. This litigation arises out of efforts by the residents of Hein Park, a subdivision located in Memphis, Tennessee, to close West Drive at its northerly end so as to bar all through traffic.[1] As found by the district court, Hein Park

> was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the

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1. A map of central Memphis is attached hereto as an appendix.

> west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.
>
> The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

As the map indicates, Springdale Street is, in fact, a northward extension, under another name, of West Drive.

The proposed closing is described by the district court in its opinion:

> The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

Although the record is uncertain whether the northernmost property owners who are acquiring the east-west strip across the width of West Drive will, in fact, bar all foot traffic as well, it is clear that the proposed conveyance

will leave them with the absolute right to do so if they wish, since the property will be private in all respects except for retained rights-of-way for certain service and emergency vehicles and utility easements.

Plaintiffs, certain black individuals and members of a class of black persons in the City of Memphis who own or stand to inherit property immediately to the north of and adjoining the Hein Park area, have attempted from the beginning to prevent the closing. They principally claim in this lawsuit that the closing of West Drive deliberately creates a barrier between the all-white Hein Park subdivision and the predominantly black residential area to the north, limiting access to and from the latter and impairing their property values. The closing is claimed to be a violation of their rights under the Thirteenth and Fourteenth Amendments;[2] they seek relief under 42 U.S.C. §§ 1982 and 1983.[3]

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2. U. S. Const. amend. XIII provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend. XIV, in part, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. § 1982 (1976) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(Continued on following page)

In an earlier appeal, our court reversed a judgment of the district court which dismissed the original complaint for failure to state a claim. In so doing, we held that the district court relied too heavily on *Palmer v. Thompson*, 403 U.S. 217 (1971), and its ruling that the closings of municipal swimming pools would not violate the Equal Protection Clause of the Fourteenth Amendment where it was shown that such closings prevented whites and blacks equally from enjoying the pools. *Greene v. City of Memphis*, 535 F. 2d 976 (6th Cir. 1976) (*Greene I*). In remanding, we held that the facts alleged in the complaint, construed in the light most favorable to the plaintiffs, stated claims under 42 U.S.C. § 1982 and, even though it had not then been specifically pleaded, under 42 U.S.C. § 1983. In dicta, our court further observed that:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. [citations omitted]
>
> This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held

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Footnote continued—

42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). [citations omitted]
>
> In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

535 F.2d at 979-80.

Upon remand, amendments to the complaint were filed certain additional individuals moved and were permitted to intervene as plaintiffs and the court certified this as a class action.[4] Thereafter a bench trial was conducted on

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4. The class was certified in accordance with a stipulation filed by the parties. That stipulation, in part, provided:

> 1. That the civil action brought by the plaintiff-intervenors through their complaint for intervention, as amended, may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2).
>
> 2. That the class is composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.
>
> 3. That the issues embraced by this class action are to be confined to those in which injunctive or declaratory relief predominate.
>
> 4. That the monetary damage claims contained in the complaint, as amended, are made on behalf of the individual plaintiff-intervenors, and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

the merits before the district judge who on June 21, 1978, entered a judgment in favor of the defendants on all remaining issues. In doing so, the judge obviously deemed himself confined to the rationale expressed in the dicta of our earlier opinion of reversal. Thus, his primary focus was on that proof which showed what action was taken by the City of Memphis on petitions filed from time to time by private citizens, white and black, to close streets and alleys within the city. In this respect the court observed that

> the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

* * *

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

* * *

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

While ruling against the plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon

> the black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the

corner to—I would be interested to know who is going to pay the eight hundred dollars [the agreed price of the 25-foot strip across West Drive]. If we get those two people to agree and lend us their names, we can stop these people on the north.[5]

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, in-

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5. The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just —

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) blacks?

MR. SPEROS: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that that is one of the areas that — we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

creased vandalism, school harassment, and increased arrests by police."[6] The trial judge additionally relied in his find-

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6. Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most important things that I think will occur is an increase in hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harrassment [sic] on the part of the children in the community that attend Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favoritism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and in the area, particularly in Hein Park.

Q So that you are not restricted — well, let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area?

A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the city of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably

(Continued on following page)

ings upon the testimony of plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area", his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it [the street closing], would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future.

The foregoing citations from the record can only be reconciled with the court's ultimate decision by conclud-

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Footnote continued—

> bring about an increase in arrests and harrassment [sic] of more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.
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> * * *
>
> . . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

ing that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief. If this was, in fact, the limit of the inquiry, the decision must be upheld, for indeed the record did not show that any black resident had ever sought to close a street primarily for purposes of reducing the traffic and contributing to the tranquility of a given neighborhood. We have considerable sympathy with the trial judge's view of his responsibility on remand since it seems supported at least by the cited dicta of our opinion. We do not conceive, however, that this was ever the full intent of our earlier decision, and it seems equally clear that the plaintiffs themselves never abandoned their effort to seek relief on a broader basis. Plaintiffs' posture in their pleadings and throughout the trial was consistent with the closing argument of their counsel:

> Going back to *1982*, which refers to the rights of blacks to hold their property in the same manner as whites, we feel that the closing of West Drive and the enhancement of the value of the properties along West Drive and the attendant and simultaneous decrease in property values that we think we have established here by the testimony of our witnesses in the black neighborhood does deny them a right protected by Section 1982. If the right is to uphold your property, we think that that right has been deprived. Not necessarily from the comparative standpoint of have black citizens ever applied for a street to be closed of this size and didn't get it, and then just close off the inquiry there.
>
> Now we understand the parameters of the Sixth Circuit's decision in this, but we would suggest that the

> interpretations of *1982* refer to the full panacean [sic: panoply] of property rights, not necessarily the transfer of property.
>
> Now, we also ask this Court in reviewing this matter be mindful of the Supreme Court's starting point and its instruction of how a case of this nature should be considered. We think that they key language; and I think this is of supreme importance here, the key language is that the Court has to conduct a sensitive inquiry. It would be our argument and it is our argument that a sensitive inquiry in a matter of this type where we are contending that there was racial motivation, racial impact entails taking in everything that was brought forth here.

The "sensitive inquiry" referred to by counsel for the plaintiffs was taken from language of the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There the Supreme Court was faced with the question of whether the refusal of the Village of Arlington Heights to authorize the construction of a public housing project within its boundaries in suburban Chicago was racially discriminatory and violated the Fourteenth Amendment. As Mr. Justice Powell observed:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis, supra,* [426 U.S.] at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears

> neutral on its face. *Yick Wo v. Hopkins,* 118 U. S. 356 (1886); *Guinn v. United States,* 238 U. S. 347 (1915); *Lane v. Wilson,* 307 U. S. 268 (1939); *Gomillion v. Lightfoot,* 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

Id. at 266 (footnotes omitted).[7]

While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed

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7. Mr. Justice Powell was referring here to *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), and its holding that the petitioners were illegally imprisoned for failure to comply with a city ordinance where such failure was the result of the city's refusal to consent to the petition of approximately 200 persons of Chinese ancestry to operate a laundry business while the same consent was granted 80 others who were not of Chinese descent. The Court held that this worked an impermissible denial of the equal protection of the laws and hence a violation of the Fourteenth Amendment, even where no express evidence of intent was found. In this regard the Court found the facts themselves sufficient:

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. *Id.* at 374.

In *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), also cited by Mr. Justice Powell, the Supreme Court struck down a local act of the Alabama legislature which redefined the boundaries of the City of Tuskegee with the effect of removing from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. As Mr. Justice Frankfurter observed:

> The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections. *Id.* at 341.

too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indeed "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]

We readily acknowledge that, as a general proposition, street closings are a matter of purely local concern. We also recognize that street closings may, indeed, be a very beneficial way of preserving the residential character of a neighborhood against the growing incursion of traffic from outside sources. Thus we take note of plaintiff's reliance upon *Arlington County Board v. Richards,* 434 U.S. 5 (1977), and the Court's observation that:

> A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter.

Id. at 7.

We further recognize that not every racially discriminatory act constitutes a badge of slavery. *See, e.g., Civil Rights Cases,* 109 U.S. 3, 24-25 (1883). *Cf. Runyon v. McCrary,* 427 U.S. 160, 211 (1976) (White, J., dissenting) ("A racially motivated refusal to hire a Negro or a white

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8. Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983. Neither our circuit nor the Supreme Court has decided this question. We note, however, that constitutional rights other than those contained in the Fourteenth Amendment have been protected under Section 1983. *See, e.g., Lane v. Wilson,* 307 U.S. 268 (1939) (violation of Fifteenth Amendment remedied under R.S. § 1979, the predecessor of Section 17983).

babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery. . . ."). Nonetheless, the Supreme Court "recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom. . . .'" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (quoting *Civil Rights Cases, supra,* 109 U.S. at 22).[9]

We are convinced that the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood under the particular circumstances found by the court here is precisely the type of "badge" which was the target of the Thirteenth Amendment and of Section 1982.[10] The broad reach of Section 1982 was repeatedly emphasized by Mr. Justice Stewart in *Jones, supra,* 392 U.S. at 422-37. As the Supreme Court later observed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969), "[a] narrow construction of the language of § 1982 would

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9. Senator Trumbull, the sponsor of the bill which ultimately became the Civil Rights Act of 1866, stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights.

36 Cong. Globe 474 (1866).

10. We also note that Section 1982 is limited in its scope to situations having a racial character. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel,* 384 U.S. 780, 791 (1966).

be inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act]."

42 U.S.C. § 1982 was enacted under authority of Section 2 of the Thirteenth Amendment.[11] *Jones, supra,* 392 U.S. at 413. Congress therein determined that the disability of blacks to enjoy property in the same manner as whites was a badge and incident of slavery. *Id.* at 439.[12]

While the Supreme Court has not often been required to define "badge of slavery" under the Thirteenth Amendment, it is clear that many badges of slavery either were a part of the recent past or remain a part of the present. As Mr. Justice Douglas stated:

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11. 42 U.S.C. § 1982, in its original form, was enacted as part of the Civil Rights Act of 1866. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144, and codified in § 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1982.

12. Mr. Justice Bradley in the *Civil Rights Cases, supra,* 109 U.S. at 20, stated regarding the Thirteenth Amendment:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.
>
> It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane v. Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder v. West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown v. Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania v. Board of Trusts,* 353 U. S. 230; *Sweatt v. Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving v. Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan v. Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley v. Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson,* 163 U. S. 537; public parks, *New Orleans Park Improvement Assn. v. Detiege,* 358 U. S. 54; restaurants, *Lombard v. Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore v. Dawson,* 350 U. S. 877; municipal golf courses, *Holmes v. City of Atlanta,* 350 U. S. 879; amusement parks, *Griffin v. Maryland,* 378 U. S. 130; buses, *Gayle v. Browder,* 352 U. S. 903; public libraries, *Brown v. Louisiana,* 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he

> addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton v. Alabama,* 376 U. S. 650.

Jones, supra, 392 U.S. at 445-46 (concurring opinion).

The closing of West Drive is merely another device leading to the same result. It would be, to blacks and whites alike, exactly what the trial judge said it was: an unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision. "When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Jones, supra,* 392 U.S. at 442-43.

Without endeavoring to establish any legal guidelines for the determination of when conduct may amount to a badge of slavery, we find the determinations made by the district court here to be altogether adequate to bring the conduct complained of within that description. The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable". Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the prop-

erty values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.[13]

OTHER ISSUES

In addition to their Sections 1982 and 1983 claims, the plaintiffs raised certain pendent state claims. The district court held that "the evidence does not support a recovery under these or any other theory under the law of Tennessee". The appellants have not questioned that decision in this appeal; we therefore have not considered it. The plaintiffs also sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. The district court found no basis for such relief and we agree. We likewise agree with the district court's decision that the plaintiffs failed to prove their claim of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments.

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13. We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. *Compare* Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L. J. 1267 *with Comments, Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y.U.L. Rev. 1030, *Cf. County of Los Angeles v. Davis*, ... U.S. ....., 99 S. Ct. 1379, 1386 (1979) (Powell, J., dissenting) (whether case brought under 42 U.S.C. § 1981 requires proof of racially discriminatory intent or purpose is an open question).

CONCLUSION

In conclusion we hold that under the unique circumstances shown here, the erection of the barrier at the northerly boundary of West Drive constitutes a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment and entitling them to a remedy under Section 1982.[14] Accordingly, the judgment of the district court is reversed and the cause remanded for the fashioning of appropriate injunctive relief.

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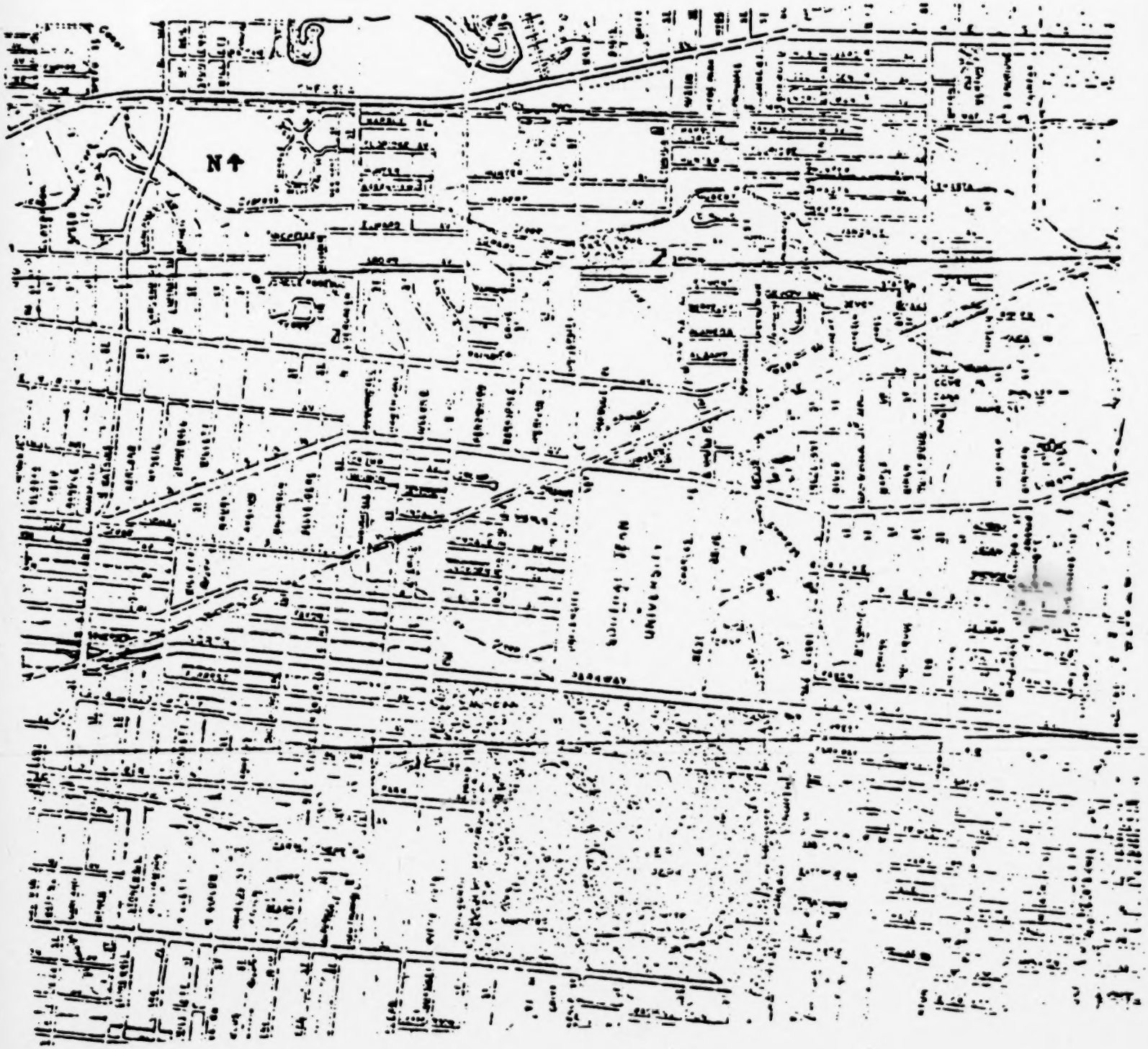
14. "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." *Jones, supra*, 392 U.S. at 414 n. 13.

APPENDIX A



CELEBREZZE, Circuit Judge, Dissenting

I must respectfully dissent because I am convinced that the majority has erred in several important respects. First, I do not believe that 42 U.S.C. § 1982 is violated by a municipality's exercise of its police powers to close a street when race is not a factor in that decision. The closing of West Drive here does not deprive black citizens of their right to hold property free from racial discrimination in the same manner as white citizens. The majority's extension of § 1982 so as to proscribe the closing of West Drive expands the scope of the statute to an unprecedented extreme and conflicts with the well-established policy of judicial deference to legislative judgment in land use regulation. Indeed, today's decision illustrates the need for a limiting principle for claims arising under § 1982. To this end I would require a showing of discriminatory intent or purpose to establish a violation of § 1982.

Second, the proper focus of this litigation, as recognized by the district court, is whether a racial minority would be denied the equal protection of the laws by the proposed street closing. I believe the district court was correct in finding that the plaintiffs had failed to demonstrate the discriminatory intent necessary to establish a violation of the equal protection clause of the fourteenth amendment. I would accordingly affirm the judgment of the district court.

I

In *Jones v. Alfred H. Mayer Co.*, 92 U.S. 409 (1968), the Supreme Court held that the enabling clause of the thirteenth amendment vests Congress with the power to identify "badges of slavery" and pass remedial legislation "necessary and proper" to eliminate them. *Id.* at 439-40. In enacting 42 U.S.C. § 1982 Congress found discrim-

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ination against blacks in the sale and rental of property to constitute such a "badge of slavery" prohibited by the thirteenth amendment. *Id.* at 440-41. § 1982 accordingly outlaws all racial discrimination, public and private, in the sale, rental, or holding of real property.

The majority's focus in this litigation is whether the right of black citizens residing north of Hein Park to "hold" their property in the same manner as white citizens residing in Hein Park would be violated by the erection of a traffic barrier on a street connecting the two neighborhoods. The majority concludes that the construction of the barrier will adversely affect black property owners north of Hein Park while at the same time benefiting white residents in Hein Park. In this disparate impact the majority discerns a violation of § 1982 and the thirteenth amendment.

It is true that the scope of § 1982 is exceptionally broad, reaching all public and private discrimination in activity affecting real and personal property. *Jones*, 392 U.S. at 437-39. The statute's proscription of racial discrimination against a citizen "holding" real property does not, however, preclude the legitimate exercise of a municipality's police powers. Where, as here, a municipality exercises those powers in a rational manner to achieve permissible goals,[1] absent evidence of racial motivation or intent, the right to "hold" property in the manner secured by § 1982 is not violated.

The right to "hold" property is the right to maintain possession while enjoying the privileges and benefits which

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1. The stated objectives of the application to close West Drive were: 1) to reduce the flow of traffic; 2) to enhance safety for children who walk to school; and 3) to reduce traffic pollution in the residential area such as noise and litter. The legitimacy of these goals is well established. *See Arlington County Board v. Richards*, 434 U.S. 5, 7 (1977).

ownership or occupancy entails in a manner untainted by racial discrimination. That right does not include an inviolate license of universal street access. Rather, street access, falling as it does within the legislative province is a subject exclusively within the legislative province and subject to regulation in the public interest.[2] There is no requirement that legislative decisions regarding land use affect all persons equally. By definition, a street closing will not result in an identical impact upon residents and non-residents.

The closing of West Drive would have a disproportionate impact both racial and geographical in nature. As a result of racial residential segregation in the area, the black neighborhood north of Hein Park will no longer have access to West Drive, while the white Hein Park neighborhood will enjoy the increased solitude and safety accruing from a decrease in traffic. While distinctions based on race are inherently suspect, distinctions between residents and non-residents of a local neighborhood are not invidious. *Arlington County Board v. Richards,* 434 U.S. 5, 7 (1977).

In light of the deference accorded legislative judgments in matters of land use regulation,[3] and because the district court's finding of an absence of racial motivation is supported by the record, the proposal to close West Drive must be viewed as creating a distinction based upon residency, not upon race. Since distinctions between residents and non-residents are permissible, without proof of

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2. Although matters of land use are within a municipality's police powers, the wide latitude in classifying and limiting property uses is always "[s]ubject to specified constitutional limitations." *Berman v. Parker,* 348 U.S. 26, 32 (1954).

3. *See Arlington County Board v. Richards,* 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

racial motivation or intent I cannot conclude that the racially disproportionate impact here is sufficient circumstantial proof of the racial discrimination outlawed by § 1982.

Indeed, today's decision represents an unfortunate overreading of section 1982. The majority's willingness to characterize the proposed street closing as a violation of § 1982 demonstrates the need for a limiting principle for actions brought under this section. The section 1982 screening mechanism, as in actions proceeding directly under the fourteenth amendment, should be a requirement of a showing of discriminatory intent.

Although the district court did not analyze the case under § 1982 and the thirteenth amendment, the majority faults the district judge for placing "too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment." The district court, however, did no more than follow the directions issued by this court in remanding the case:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; *he must prove racial motivation, intent, or purpose,* in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976) (emphasis added).

The majority dismisses this instruction as dictum and does not address the question of whether cases brought under § 1982 — like cases brought directly under the fourteenth amendment — always require proof of discriminatory intent. I believe that we are required to follow

the explicit instructions of our prior decision regarding the components of a § 1982 claim, and would therefore require a showing of discriminatory intent to establish a violation of section 1982.

Interpreting section 1982 to require discriminatory intent is consistent with the Supreme Court's admonition in *Jones* that Congress intended section 1 of the Civil Rights Act of 1866 — the source of § 1982 — "to prohibit *all racially motivated* deprivations of the rights enumerated in the statute. . . ." 392 U.S. at 426. (emphasis added). Section 2 of the 1866 Act reinforces the requirement of racial intent by imposing sanctions upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.

The legislative history of § 1982 also indicates that it should parallel the fourteenth amendment's standard of proof. Although the 1866 Act, the forerunner of § 1982, is generally regarded as a "Thirteenth Amendment statute," *See Jones,* 392 U.S. at 422, 437-38, it has also been found to rely on the fourteenth amendment. The fourteenth amendment was enacted, in part, to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436. It is not unreasonable to conclude that the standards for establishing a prima facie case of discrimination under § 1982 and the equal protection clause of the fourteenth amendment should be the case: there must be proof of discriminatory intent.

Finally, an observation made by the Supreme Court in *Washington v. Davis,* 426 U.S. 229 (1976), is relevant here. The court was concerned about the problems that could be generated if the fourteenth amendment was violated by a mere showing of disparate racial impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248 (footnote omitted).

Section 1982, extending as it does to the expansive realm of both public and private action involving property, might well precipitate many of these same consequences if proof of discriminatory intent is not required. For these reasons, I cannot agree that the facts and circumstances of this case establish a violation of 42 U.S.C. § 1982.

II

The district court based its decision in favor of the City of Memphis on the plaintiffs' failure to establish the requirements of a prima facie case under the equal protection clause of the fourteenth amendment. The district court found that the closing of West Drive would have a "disproportionate impact on certain black citizens," but there was not "sufficient proof or racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." Moreover, the district

court did not believe that the disparate impact was so stark that an intent of racial discrimination could be inferred. I conclude that the district court's findings of fact and conclusions of law are neither clearly erroneous, F.R.Civ.P. 52(a), nor incorrect as a matter of law.

Recent Supreme Court decisions mandate that to establish that a governmental defendant has deprived plaintiffs of constitutional rights guaranteed by the fourteenth amendment, something more than a disproportionate discriminatory impact must be shown. Proof of a racially discriminatory intent or purpose is also required to show a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-45 (1976). The recent opinion of *Personnel Administrator of Mass. v. Feeney*, ... U.S. ..... (1979), provides a functional definition of "intent":

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at ..... (footnote omitted).

Applying the Supreme Court's elaboration in *Feeney* of the *Washington v. Davis* and *Arlington Heights* impact-plus test, the district court's conclusions are, if anything, reinforced. The record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive "because of" the adverse effects the black citizens north of Hein Park might experience.

The absence of evidence of discriminatory intent does not, however, signal the end of the inquiry. Under the applicable *Arlington Heights* criteria, "invidious discriminatory purpose" can be inferred or detected through an inquiry which weighs a number of factors. Proof of discriminatory intent does not pose an insurmountable obstacle because *Arlington Heights* liberalized the probative value of various kinds of circumstantial evidence relevant in an inquiry into motive.

The first *Arlington Heights* factor — disparate impact — is present here. As I indicated, the disparate impact of the closing of West Drive is both racial and geographical in nature. I believe that the district court was correct in concluding that this disparity does not constitute a stark pattern of discrimination from which racial intent can be inferred. It is clear that disparate impact, standing alone, will only infrequently suffice to establish an equal protection violation. *Washington v. Davis*, 426 U.S. at 242; *Arlington Heights*, 429 U.S. at 265-66. Absent a stark pattern of discrimination from which intent may be inferred, further inquiry is necessary.

The second evidentiary source bearing on intent is the historical background of the decision. Particularly relevant here would be a "series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Upon careful examination, the background of the decision to close West Drive appears untainted by any invidious action. The legislative machinery was set in motion by the submission of an appropriate application to the Planning Commission. The Commission processed the application and in time, the City Council voted to approve the closing. In sum, the "background" of this decision fails to reveal racial intent. And the same result is reached in considering the third factor specified in *Arlington Heights*

— the specific sequence of events leading to the challenged decision.

The district Court's opinion does not record any instances of departures from normal procedural sequences or any "substantive" departures from normal decisionmaking (the fourth and fifth *Arlington Heights* factors). To the contrary, the decision to approve the closing of West Drive is consistent with the approvals granted other applications to close streets and alleys. It is true that the West Drive application is the first attempt to close a street in the nature of West Drive. Yet I cannot subscribe to the view that the initial attempt to utilize procedures prescribed by law for closing a street, without more, constitutes circumstantial proof of racial bias.

Where, as here, the applicable *Arlington Heights* "evidentiary sources" for a gleaning of official intent fail to reveal direct and circumstantial proof of discriminatory intent, an inference of invidious purpose cannot be drawn. I do not find from the record before me that in closing the street the City infringed upon constitutional rights, nor do I find that the City acted with malice or intent to discriminate because of race. Therefore, I would affirm the district's court's decision that the fourteenth amendment has not been violated.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
78-1527

N. T. GREENE,
Plaintiff-Appellant,

and

EDWIN OWENS, et al.,
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, et al.,
Defendants-Appellees.

ORDER

(Filed December 11, 1979)

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges

Defendants-Appellees have filed herein a petition for rehearing with a suggestion that the petition be heard by the court sitting en banc. Less than a majority of the judges of this court who are in regular active service of this court having favored rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. Upon consideration, it appearing that the petition presents no issues which have not already been fully considered by the court.

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Judge Celebrezze would grant the rehearing for the reasons set forth in his dissenting opinion previously filed.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 78-1527

N. T. GREENE,
Plaintiff-Appellant,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendant-Appellees.

ORDER STAYING MANDATE

(Filed January 18, 1980)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 78-1528

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, DEWIN OWENS AND CAROLYN BURSE,
Intervenors-Appellants,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

(Filed January 18, 1980)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLER

APPENDIX

In the Supreme Court of the United States

October Term, 1979
No. 79-1176

CITY OF MEMPHIS, ET AL.,
Petitioners,

vs.

N. T. GREENE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Certiorari Filed January 30, 1980
Certiorari Granted May 12, 1980

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(Filed April 1, 1974)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Civil Action No. 74-208

N. T. GREENE, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, AND SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor of the CITY OF MEMPHIS, the COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER as Chairman of the COUNCIL OF THE CITY OF MEMPHIS,
Defendants.

COMPLAINT

1. This action arises under the Act of July 25, 1958, 72 Stat. 415, 28 U.S.C. 1331, a matter in controversy exceeding the value of $10,000.00, exclusive of interest and costs, and arising under the Constitution, laws and common law of the United States;

2. This action also arises under the Act of September 9, 1957, 71 Stat. 637, 28 U.S.C. 1343 (3), to redress the deprivation, under color of state legal action, of person and property rights secured by the Constitution of the United States and also by acts of Congress providing for equal rights;

3. This action also arises under the Act of April 9, 1866, 14 Stat. 27, 42 U.S.C. 1982, to insure by private attorneys general that all citizens of the United States shall

have the same rights, equal enjoyments, and property-linked benefits in the state as are enjoyed by white citizens and residents thereof.

4. This action proceeds also pursuant to the Act of July 7, 1958, 72 Stat. 349, 28 U.S.C. 2201, to declare rights and other legal relations of all of the interested parties herein for the matters referred to, whether or not such further relief be sought by some of them;

5. This action seeks to have declared unconstitutional governmental actions of defendants;

(a) in striking from municipal budget, planning funding, and construction of a $750,000 federal-state financed Community Center in Plaintiffs' neighborhood north of Jackson Avenue, Memphis, Tennessee; and

(b) in closing through traffic access to West Drive between Jackson Avenue and North Parkway Boulevard, Memphis, Tennessee; and

(c) in enforcing any and all municipal ordinances, resolutions, or activities relative to the foregoing specific matters, accomplished or sought to be accomplished without adequate notice and public hearing;

6. This action also seeks mandatory orders terminating the above particular deprivations of equal protection of laws and of due process of laws and implementing and fashioning judicial remedies to specifically provide fundamental services and allocate governmental funds:

(a) to construct and federally finance or otherwise pay for a $750,000 Community Center in plaintiffs' neighborhood north of Jackson Avenue; and

(b) to maintain open to through traffic West Drive between Jackson Avenue and North Parkway; and

(c) to establish and abide by provisions for notice and public hearing on all municipal matters determinative of basic human necessities, social benefits, or sensitive interest.

7. The individual Plaintiffs are citizens of the United States and citizens and residents of the City of Memphis, Shelby County, State of Tennessee, and the Civic Club Plaintiffs are unincorporated associations of similarly situated persons and all of the Plaintiffs, named and unnamed, have personal and property interests in the geographical area of the City of Memphis, hereinafter described.

8. All of the Plaintiffs individually and as a class reside in the City of Memphis in the geographical area north of Jackson Avenue and bounded by Springdale Street on the east and Watkins Street on the West and Wolf River on the north.

9. The Defendant City of Memphis is a political subdivision of the State of Tennessee and the municipal corporation duly administering and governing the properties and affairs of the people thereof, and the other defendants are the duly elected and acting executive and legislative officers, respectively of the City of Memphis.

10. On or about February 5, 1974, the Defendants, as aforesaid, unlawfully prevented, and do still so continue to prevent, the budgeting, planning, funding and construction of a $750,000 Federal and State financed Community Center in Plaintiffs' community;

11. On or about February 5, 1974, the Defendants, as aforesaid, unlawfully prevented and do still so continue to prevent Plaintiffs' vehicular access to and over West Drive

at Jackson Avenue and Springdale Street Extended, connecting Plaintiffs' community to North Parkway;

12. In all of the governmental activities involved in the foregoing, Defendants unlawfully failed and refused to give public notice and to provide for and hold public hearing to Plaintiffs;

13. Unless otherwise ordered so to do by this Court, Defendants intend to, threaten to, and will continue to unlawfully deprive Plaintiffs of the Community Center, the street access, and the notice and public hearings, all as aforesaid, and as a result of which Plaintiffs will suffer irreparable damages.

14. Damages to the Plaintiffs' personal, property, and civil rights and to their property-linked benefits and enjoyments, unlawfully deprive them of the basic human necessities, social benefits and sensitive interests constitutionally protected, as hereinabove referred to.

15. Pursuant to all of the foregoing, Plaintiffs are lawfully entitled to have this Court adjudicate their claims, redress their deprivations, insure their property-linked benefits, declare their rights and legal relations, and to have declared unconstitutional the actions of the Defendants complained of;

WHEREFORE, Plaintiffs pray the Court to issue its orders, judgments and decrees for Plaintiffs and against Defendants on the matters and things aforesaid, and particularly

Plaintiffs pray to the Court to issue mandatory orders terminating Defendants' said actions and implementing and fashioning judicial remedies which, under the circumstances, give Plaintiffs equal protection of the laws, due process of the laws, and specifically provide fundamental governmental services and allocate governmental funds;

(a) to construct and federally finance or otherwise pay for a $750,000 Community Center in plaintiffs' neighborhood north of Jackson Avenue; and

(b) to maintain open to through traffic West Drive between Jackson Avenue and North Parkway; and

(c) to establish and abide by provisions for notice and public hearing on all municipal matters determinative of basic human necessities, social benefits, or sensitive interest.

FINAL PRAYER

For attorney fees, costs and such other relief as the Court deems proper.

Respectfully submitted,

Byrd and Kustoff
745 Commerce Title Building
Memphis, Tennessee 38103
By: /s/ Frank C. Byrd
Attorney for the Plaintiffs

(Jurat Omitted in Printing)

(Filed August 22, 1974)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE

(Title Omitted in Printing)

AMENDED COMPLAINT

Plaintiff, N. T. Greene herein continues to adopt entirely his original Complaint, sworn and subscribed to on the 29th day of March, 1974, and filed on April 1, 1974, and in addition thereto pursuant to Rule 15 (a), Federal Rules of Civil Procedure, Plaintiff hereby amends his original Complaint as a matter of course by substituting the following:

PART I

Facts as to the Closing of West Drive

1. That Plaintiff and other concerned citizens learned of the closing of West Drive about the middle of November, 1973, from a phone call by Mr. Calvin Woods (a civic-minded resident of the Wilshire Park area). Mr. Woods said there was something in the local newspaper about the closing of West Drive. Sometime later, on or about the 25th day of January, 1974, while at the City Hall on other business, Plaintiff noticed the closing of West Drive was on the City Council agenda. The Council was to meet on January 29, 1974, to decide the proposal. Plaintiff and others decided to put out a "leaflet" informing the general public of the resolution. Further, Plaintiff and others worked making phone calls, contacting people, and etc. encouraging people to attend the Council meeting.

2. That about 50 people (who live north of Jackson Avenue) went to the Council meeting on January 29, 1974, at 2:30 p.m. Plaintiff here to the Court shows the full minutes of that meeting and offers them as an exhibit. That at the hearing, the Chairman allowed time (15 minutes) to the proponents for closing West Drive, and time (15 minutes) to the proponents against the closing. The following arguments were made for closing West Drive:

(a) *Mr. Bob Miller* (Director of Planning for the City of Memphis) said the Planning Commission had reviewed this matter on November 1, 1973, and recommended that there be a "conditional closing" approximately 25 foot wide. That Hein Park residents would pay for the relocation costs, and that the Fire Department wanted a 24 foot clearance without any obstruction other than the "row of curbing", and normal types of "speed breakers". That he had a letter from L, G, & W (Memphis Light, Gas, and Water), offering no objections (never produced); a letter from the Sanitation Department, offering no objection (never produced); a letter from the Telephone Company, offering no objection (never produced); a letter from the Police Department, indicating some reservations about the closing because more time would be required for "police calls", but basically no objection (never produced). Further, Mr. Miller had "telephone communications with the Fire Department and Public Works Department which indicated the conditions required by the Planning Commission. That he had sent letters to the Public Works Department (copies of letters never produced), but had never received a written reply one way or the other. That he assumed no reply meant "sanction". That he has continued to call

the Public Works Department, but has never received an "official communique". Further, that there was a lengthy "public hearing" on this matter at a meeting of the whole Planning Commission. That notices were sent out to the people up and down West Drive, and there was only one objection (Mrs. Sarah F. Terry, at 732 West Drive). That as far as Mr. Miller knew, all the residents within West Drive participated in the application to close West Drive. Mr. Miller closed by saying he would like to see the subdivision stay in its "tranquil atmosphere", and the closing of West Drive was vital to maintain a "good mid-town residential area".

(b) There was then some discussion regarding an "internal report" from the traffic engineer to Frank Palumbo on October 22, 1973, but the report was not before the Council.

(c) *Mr. Clay Huddleston* (Chief Administrative Officer of Mayor's Office) testified the Mayor approved the closing.

(d) *Mr. Bob Miller* said the closing of the street would allow emergency vehicles to get through.

(e) *Mr. David Parker* (resident of West Drive[)] spoke and stated he had been a resident of West Drive for 30 years. He told the Council a bus load of Hein Park residents were present in the Council room. That there was some five years of study and planning involved.

(f) *Dr. Bill Weber* (a resident of West Drive and chairman of the Hein Park Civic Association) stated the subdivision had been in existence for 50 years. He talked about a traffic engineer who reported

there were 1,600 to 1,700 cars per every 12 hours in the area or about 2,000 cars per day. That in the mornings and afternoons the traffic count was about 200 cars per hour or one car every 15 seconds. That the heavy traffic originated in other areas of the City and not in Hein Park. That the traffic could be sent on other collector streets. That there would be several speed breakers, a roll curb, and emergency vehicles could get through. There would also be an extended sidewalk and appropriate signs. He stated he did not feel their action was setting a precedent. That there are a number of dead end streets, a number of streets two blocks long, that have no destination, in Memphis, That in newer subdivisions (in Memphis) this type of traffic flow is automatically built into the plans. Further, the residents of Hein Park are not attempting to "isolate" themselves from any other part of the neighborhood. That the different sizes of the houses in Hein Park shows no great bias. Dr. Weber referred to a letter from the Central Garden Area Association (which letter was before the Council) supporting the Hein Park residents. Further, Dr. Weber stated that unless the Hein Park residents did something, the 50 year-old subdivision would "deteriorate".

(g) *Mrs. Betsy Robbins* (a resident of West Drive) testified the traffic had become "heavier and heavier". That residents did not want to cut themselves off from their neighbors, but the greatest worry is "children". She found herself "daily" rushing to the window when she heard screeching brakes. She further stated "we" lost a dog on the street, but she was thankful it was not a child.

(h) *Mr. Joseph Haas* (a consulting engineer in the City of Memphis) said the closing would amount to speed breakers and a 24 foot "clear passage" for emergency vehicles. The speed breakers were to discourage any through traffic.

(i) Mr. Miller testified again that any of the utilities that have to be relocated will be done at the residents' costs.

3. For those opposing the closing of West Drive, the following arguments were made:

(a) *Mrs. Sarah Terry,* (a resident of West Drive) said she used the Jackson Avenue - West Drive entrance "daily", and was told by a member of the Planning Commission staff, that they had to have 100% approval by the residents of West Drive. She feels West Drive is a public street and the residents could not "dictate" who may or may not use the street. That West Drive is definitely a convenient road for people coming south on Springdale. That West Drive is the only through street between University and Trezevant. That as far as safety of children is concerned, that is the responsibility of parents. That to close West Drive would simply re-route other traffic from within Hein Park to that of another street within Hein Park.

(b) *Mrs. Vicki Vincent* (of the Vollintine-Evergreen Community Action Association) stated there were two residents, who live on West Drive, who opposed the closing (the Terry family and the Thomas family). She said speed breakers would be a deterrent to through traffic and sidewalks could provide safety for children and elderly

residents. That to close the street would set a "dangerous precedent". That when this matter was initially brought before the Planning Commission (4th day of October, 1973), it was rejected. That if West Drive was closed the VECAA fears the Council will be opening up a "giant can of worms". That citizens from Red Acres to Parkway Village, from Chickasaw Gardens to Central Gardens will want the same thing. That people all over the City will want the same thing.

(c) *Mr. Calvin Woods, Jr.* (a resident of East Drive) stated West Drive is a public street built and maintained by all of your tax money. That the residents of West Drive should be made to build public sidewalks just as he was made to do in the front of his house.

(d) *Mr. Emanual Goldberger* (a resident of Barbara Drive) said he was against the closing because it is the only place that has a traffic light that leads us out of our part, north of Jackson between Springdale and Hollywood. That the children on East Drive, Trezevant, and Barbara Streets are just as dear to their parents as the children in Hein Park. That the Council should build a park in the area for the children to play in.

(e) *Mr. Henry Jackson* (representing Shankman Hill Civic Group) stated he and others paid a great deal of taxes. That the "speed breakers" will cause mass confusion with the intersection (some cars trying to make turns and others going through Hein Park). He remarked, "I believe that the law applies to everybody equal". There would be no accidents if sidewalks were put in.

(f) Rev. Cummings (a resident at Springdale and Almeda) stated if a sidewalk was needed on West Drive, then the Council should authorize it, but not close West Drive.

(g) *Plaintiff* stated Hein Park residents had continuously, since the 1940's, "waived the law", in so far as public sidewalks are required in residential areas, for their own benefit. That now the Hein Park residents want West Drive closed. That tax payers' money built and maintained West Drive all these years, and tax payers' money will continue to maintain West Drive. That he had talked to State Rep. Doyle Daniels, who opposed the closing of West Drive. That to close West Drive will set a dangerous precedent.

4. That after the proponents for and against had spoken, there was a general discussion among the Council members about the merits and demerits of the closing of West Drive. Some thought that the problem was one simply of traffic and speed and that speed breakers were the only thing necessary. Councilman Ford pointed out that speed breakers could not be located on a "dedicated street" and could only be put on private property. Mr. Ford further recommended a speed of 20 m.p.h. and radar units to patrol the neighborhood. Mr. Allissandratos stated, we have closed alleys in the past, but that West Drive is not an "alley". He had information that the Police Department thought the closing could cause disruption of police services in the area. Councilman Love said the heavy flow of traffic (through Hein Park) impeded the Police Department's work, citing an instance when the police were looking for a "molester" that was getting "males" all over town, a year or so ago. Mr. Huddleston testified 820 cars passed through the West Drive in a 12

hour period. Councilman James suggested a compromise by putting a 15 mile speed limit on West Drive. Mr. Woods spoke up and said that he was going to tell it like it is, "They don't want the Black people in there noway. That's the way it is." Mr. Woods further said, "I doubt if a hundred cars go through there during the day between 7:00 or 6:30 till 9:00. There may be that many cars, maybe 200". That the Council then voted on the resolution, 8 - 3 in favor, thereof.

5. That later Councilman Bob James informed Plaintiff on the 30th day of January, 1974, that Councilman Allissandratos would ask the whole Council to reconsider the closing of West Drive at its next meeting on February 5, 1974. That before the February 5th meeting, Plaintiff and other interested citizens did the following to further the justness of their cause:

(a) Held a press conference in front of the Jackson Avenue Church of Christ at the intersection of Jackson Avenue and West Drive; announced to their fellow citizens the Council was going to reconsider the resolution.

(b) Held a public meeting in the Jackson Avenue Church of Christ where the following civic leaders spoke:

(1) Mr. Russell B. [Sugarmon] (well-known Black political leader)

(2) Councilman Ford

(3) Rev. David Shanks (Overton Park Church of Christ)

(4) Plaintiff

That at the end of said meeting, it was decided people should go down for the February 5th Council meeting to express their opposition to the closing of West Drive.

6. That on February 5, 1974, at 2:30 p.m., Plaintiff and other citizens appeared before the City Council. That Plaintiff and others desired to address the Council, but were denied this right. That Chairman McBrayer refused such rights saying the "public hearing" had already been had. The Council further refused to accept 742 signatures on various Petitions (copies here to the Court shown, and entered as an exhibit) (said Petitions were received later by the Council on February 19, 1974, and Plaintiff offers as an exhibit the entire transcript of the Council meeting that date). That a vote was taken on the motion to reconsider, and the vote was 7 - 5 against.

7. That subsequently, Councilman Ford put a new resolution on the agenda to reopen West Drive. That on Tuesday, the 26th day of February, 1974, there was to be a "public hearing" before the Public Works Committee, with the full Council. That on said date, and at said time, and for said business, no one showed up, but Plaintiff, Councilman Ford, and other interested citizens. Again Plaintiff and others were denied any further public hearings. Plaintiff here to the Court shows the entire transcript of the Council's meeting, February 26, 1974.

8. That a week later, on the 5th day of March, 1974, the same resolution by Councilman Ford (to reopen the closing of West Drive) failed by a vote of 6 - 4. That again there were no public hearings at this time. That Plaintiff became exasperated and began to seek relief before this Honorable Court. Plaintiff here to the Court shows the transcript of the Council's meeting, March 5, 1974.

9. Further, Plaintiff says that he now shows to the Court the entire Planning Commission file on the closing of West Drive, beginning in July, 1970, and running up until the present Council's vote. Plaintiff enters this report as an exhibit to his cause. Further, that therein is con-

tained various studies, maps, and proposals by the various City Departments, demonstrating their recommendations. Plaintiff says that, for some unknown reason, this information, in its complete form, was kept from the full Council. Further, that a careful reading of this entire file indicated there is no valid reason for the closing of West Drive.

10. Further, Plaintiff says that the closing of West Drive is based on racial prejudice. That Hein Park subdivision is surrounded by expanding Black residential areas. That Hein Park residents are almost all White, and they desire to keep "Blacks" from traveling through Hein Park, by cars, by sidewalks, or otherwise. That a part of the whole history of Hein Park has been to promulgate racial interests and/or prejudices. That as far back as 1940, when the Overton Park Zoo allowed Negroes only one day a week in the Park, the Hein Park residents refused to build sidewalks on West Drive so as to keep Negroes from walking to the Park and Zoo through West Drive. That ever since the 1940's, West Drive residents have systematically stopped the paving of sidewalks on their drive.

11. Plaintiff here to the Court shows and offers as an exhibit, excerpts from the official minute book of the Memphis Park Commission, demonstrating racial prejudices. Further, Plaintiff offers information from the Division of Public Works as an exhibit, describing how, when, where, and the priorities for building City sidewalks. Plaintiff asks the Court to note that second highest priority for building City sidewalks is for streets furnishing access to *park*, playgrounds, shopping centers, and other community facilities. The first priority relates to schools.

12. Further, Plaintiff says the Defendant's actions in closing West Drive were unreasonable, capricious, and were never supported by substantial proof. That the Defendant's actions deprived Plaintiff and others of their

property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. 1982, 28 U.S.C. 1343 (3). That Defendant's actions in closing through traffic access to West Drive between Jackson Avenue and North Parkway Boulevard, Memphis, Tennessee, was an unconstitutional governmental action.

13. Plaintiff prays for the same relief as heretofore set out in his original Complaint and said original Complaint as heretofore stated is adopted in its entirety.

PART II

Facts as to Refusal to Build Community Center

1. That Plaintiff and other citizens of Shelby County became interested and saw the need for a community center in the Vollintine School area. That at the time of their awareness, Plaintiff was a member of the Shelby County Democratic Voters Council, Precinct #40-2. A precinct club meeting was called and the possibility of the center and needs for same discussed. That such a meeting occurred during the early part of September, 1973, at N. Michael Circle, Memphis, Tennessee. That at the conclusion of said meeting, it was decided to inform the larger Black community of the needs and the desirability of a community center.

2. Later, a larger public meeting was called and held at the [Baron] Hirsch Synogogue on September 9, 1973. Among those present were the following civic leaders:

(a) Councilman J. O. Patterson

(b) Councilman Bob James

(c) Maxine Smith - Memphis School Board Member

(d) Rabbi Skoop ([Baron] Hirsch Synogogue)

(e) Father John Scola (Little Flower Catholic Church)

(f) Rev. Lloyd Barker ([McLean] Baptist Church)

(h) Many other interested citizens

3. That at said meeting, there was a general discussion and a general consensus of the obvious need for such a facility. It was agreed such a facility could do the following for the community area:

(a) curb juvenile delinquency

(b) give young people a place to play and a place to put their energies.

(c) it was to be a supervised recreation center

(d) seamstress classes to teach girls to sew

(e) offer guidance (organized) to children in area on how to develop their talents

(f) athletic sports

(g) give young people and adults a safe place to congregate at night

(h) be used as an education forum for the arts and crafts

(i) be used for people in the area to get to know each other on a friendly, relaxed, and enjoyable basis

4. That at the conclusion of said meeting, it was agreed a representative contact the Mayor's office and arrange a meeting.

5. That a letter, dated October 10, 1973, was sent to Mayor Wyeth Chandler (copy here to the Court shown) requesting a meeting with him. That such a meeting took place at the Mayor's office, October 30, 1974, at 11:00 a.m.

That at the meeting the following civic leaders of the Vollintine Community area were present:

(a) Plaintiff

(b) a number of housewives, and others from the area

(c) a representative of the Park Commissioner's office

(d) Mr. Irving Sachritz (Vollintine-Evergreen Community Action Association)

The meeting with Mayor Wyeth Chandler was cordial and it was agreed the Mayor would order his staff to see if funds were available for such a community project. The Mayor said he would be "in touch" and would let everyone know the results of his investigation in a week or ten days.

6. The Mayor later informed the Plaintiff he had discussed the matter with Mr. Clay Huddleston (Mayor's chief administrative officer), and found a justification for the proposed facility. That it would be placed in the Capital Improvements Program (which would shortly be submitted to the Memphis City Council) (copy of page in Capital Improvements Program here to the Court shown and entered as an exhibit). That subsequently, Mayor Chandler was invited to appear and speak to the residents of the Vollintine-Evergreen area at the Barren Hirsch Synogogue. The talk and meeting took place on the 16th day of January, 1974, at 7:30 p.m. Plaintiff was master of ceremonies, and introduced the Mayor. Among those attending were the following civic leaders:

(a) Rabbi Rafael Grossman (the newly installed Rabbi of the [Baron] Hirsch Synogogue[)]

(b) Squire Jessie Turner (Shelby County Court)

(c) Mrs. Irene Dycus (Chairwoman of the Memphis Political Cacus [sic])

The Mayor said he brought "sad tidings". That the Council's Budget Committee had removed the proposed center from the Capital Improvements Program. That discussion and debate was held and it was concluded an attempt would be made to have the item put back in the budget and "public hearings" held.

7. That Plaintiff sent a letter to Councilman Allissandratos (Chairman of the Budget Committee) on January 17, 1974. Plaintiff generally said the citizens wanted this project restored to the budget and "public hearings" held before the Budget Committee. A reply came from Mr. Allissandratos denying Plaintiff's request. On January 18, 1974, Plaintiff sent a letter to Councilman Ed McBrayer (Chairman of the City Council) requesting public hearings before the Council (copy here to the Court shown). On January 23, 1974, Plaintiff received a letter (copy here to the Court shown) from Councilman McBrayer, wherein he stated the Budget Committee did not hold "public hearings", and the Budget Committee's "recommendations" would be heard before the "public session" of the Council on February 5, 1974.

8. The Council meeting on February 5, 1974, took place at 2:30 p.m. Plaintiff here to the Court shows the entire minutes of said Council meeting, and enters them as an exhibit. That at the said meeting, Plaintiff and other interested citizens learned the proposed Vollintine Neighborhood Facility had been deleted from the Budget Committee's report to the Council. Further, there was only one way to get the Center reconsidered, and that was an amendment with a second to same. Councilman Ford made the motion and Plaintiff asked Councilman Patterson to second the motion, but Councilman Patterson refused. The Chairman then allowed Plaintiff to raise questions to the Council, but told Plaintiff the Council did not have to "answer" any questions. Plaintiff told

the Council the proposed facility called only for Federal and State funds. That there had never been any "public hearings" on the center, and he felt such a lack thereof was unfair and unjust. Councilman Patterson spoke up and said there were no Federal monies available for such a facility, and that even the past president of the Park Commission was in the audience, nodding his head "approvingly". That a roll call was taken, and Councilman Ford's amendment died for lack of a second. The present Capital Improvements Program was approved by the Council, without the Vollintine Neighborhood Facility being in same.

9. That Plaintiff and other citizens had the following information to present to the Budget Committee and/or to the Council which was not considered:

(a) A letter dated October 22, 1973, from Miss Eddie Ruth Echols, Director of Research and Demonstration Projects for Shelby County Intergovernmental Coordination Department, (copy here to the Court shown). That said report demonstrated the sources of Federal and Private Foundation resources for a project such as the Vollintine Neighborhood Center.

(b) A count of persons by age, race, and sex of the Vollintine area (copy here to the Court shown).

(c) A mimeographed copy of a letter on January 18, 1974, to Councilman Ed McBrayer (Chairman of the City Council) demonstrating the need for such a facility (copy of letter here to the Court shown).

10. Further, Plaintiff says that during the time of the Budget Committee's study, no "public hearings" were ever held (though they were optional) (see rule .....).

That the City Council was well aware of the "public interest" of the project, and never held "public hearings" (though they were optional - see rule .....). That the Council knew of the "public interests" as demonstrated by the following:

(a) Public meetings were held in the neighborhood by interested citizens.

(b) Literature was deciminated [sic] over a large section of the community.

(c) Car loads and a bus load of residents and children attended the Mayor's office and succeeded in convincing him of the need for such a facility.

(d) Various civic groups or representatives thereof came to the neighborhood meeting Council meeting, and met with Mayor Chandler:

(1) Vollintine-Evergreen Community Action Association

(2) University Lanes Improvement Club

(3) McClain Baptist Church

(4) Shelby County Democratic Voters Council

(e) From N. Parkway to Wolf River, From Hollywood Street to Watkins Street, there is no supervised neighborhood facility.

(f) That there was an "obvious" need for such a facility.

11. Further, Petitioner says that there have been seven community centers built in the City of Memphis since 1970. (copy of letters from Park Commission office here to the Court shown and offered as an exhibit). That the costs and locations of said centers demonstrate a racial bias or prejudice. That the Plaintiff here to the Court

shows a letter from the Commissioner of Parks recommending community centers every one to one and one-half mile radius of each neighborhood. That no reason has been pointed out for not putting a center in the Vollintine-Evergreen area except to say that there is a facility at Bickford Park, and the Klondyke Street area. (Bickford Park is five miles from Vollintine School; the Klondyke Street facility is more than one mile from the Vollintine School). That the center just completed at Bickford cost $640,000.00 (2/3 of the money coming from the U. S. Government). That the proposed center at Raleigh will cost over one million dollars, and this is a White neighborhood. That Mr. James E. Hadaway (Executive Director, Memphis Park Commission) stated in his letter to Plaintiff (copy here to the Court shown) that the "goals" of the Commission called for the City to build centers within one mile of every citizen of Memphis, hopefully to serve between 10,000 and 25,000 population. That this had been the ". . . position of the Memphis Park Commission since the inception of the Capital Improvements Program in 1968." That the Vollintine-Evergreen area fits the criteria for the Park Commission's goals.

12. Further, Plaintiff says that as a result of Defendant's action, no public hearings were ever held by either the Budget Committee or the full City Council on the proposed Community Center. That such refusal of hearings was without reason and denied the Plaintiff "due process of law" and "equal protection of the law", as guaranteed by the Fourteenth Amendment of the United States Constitution, and as protected by 42 U.S.A. [sic] 1982, 28 U.S.C. 1343 (3). That the Defendant's refusal to build same was arbitrary, capricious, and unreasonable, and unlawful. That the actions of the Defendants in striking from the municipal budget, planning, funding, and construction of a $750,000 (Federal-State financed) Commu-

nity Center in Plaintiff's neighborhood, north of Jackson Avenue, Memphis, Tennessee, was unconstitutional governmental action.

13. Plaintiff prays for same relief as heretofore set out in his original Complaint and said Complaint as heretofore stated is adopted in its entirety.

14. Plaintiff additionally prays for mandatory orders directing the City Council of Memphis, Tennessee, to restore the said community center to the municipal budget and to hold public hearings on same.

PART III

Facts as to Lack of Public Hearings

1. Further the Plaintiff says he here to the Court shows and enters as an exhibit a copy of the Rules of Procedure as adopted by the City Council of Memphis, Tennessee. That said Rules were in effect when the Plaintiff was not allowed full public hearings on either the resolution to close West Drive or the deletion from the municipal budget of the proposed Vollintine-Evergreen community center.

2. Plaintiff says that the Rules of Procedure were violated in regards to the community center in the following ways:

(a) Rule C-38 gave the Budget Committee optional public hearings which were never allowed by said Committee.

(b) That at no time does the record ever reflect that any public hearings were ever heard on the proposed community center.

3. Plaintiff further says that the Defendants violated the Rules for a public hearing on the closing of West Drive in the following manner:

(a) That the so called "public hearing" that was held was unreasonable, unfair, and unjust.

(1) There was no notification to the general public or more specifically to the neighborhoods most readily affected.

(2) That the time allowed for both sides to present their arguments was too short.

(3) That no cross-examination was allowed of any witnesses by general public.

(4) That no opportunity was allowed to examine documents offered by opposing sides.

4. Further Plaintiff says that such denials of public hearings and denials of public notices violates his and others Constitutional rights as protected by the following:

(a) The "due process" and "equal protection" clauses of the 14th Amendment of the U. S. Constitution.

(b) The right to petition the Government for a "redress of grievance" protected by the 1st Amendment of the U.S. Constitution.

5. Further Plaintiff says that to close West Drive from free "access" by fellow citizens of Shelby County without adequate, reasonable, and fair public hearings and notices thereof, violates the Plaintiff's and other's right as guaranteed in the 13th Amendment of the U. S. Constitution: "That neither slavery or involuntary servitude except as a punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". That is to say, that to deny equal "access" is to deny "equal protection of the law", is to deny "due process" and to subject non-residents of Hein Park to slavery or involuntary servitude for the maintenance and care of West Drive.

6. Plaintiff says that to close West Drive or to delete the said community center from the municipal budget, without fair public hearings and fair public notices, violated the Plaintiff's and other's Constitutional rights as guaranteed by the 9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". Further, such actions by the Defendants violates the Plaintiff's and other's Constitutional rights as guaranteed by the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

7. Plaintiff prays for the same relief as heretofore set out in his original Complaint and said original Complaint as heretofore stated is adopted in its entirety. Plaintiff further asks for mandatory orders to require the Defendants to have fair public notice and fair public hearings on all matters of public interest.

Respectfully submitted:

Raymond P. Gibbs
Attorney at Law
107 Professional Bldg.
Murfreesboro, TN 37130

By: Raymond P. Gibbs
Attorney for Plaintiff,
N. T. Greene

(Certificate of Service and Jurat Omitted in Printing)

(Filed October 4, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREEN, EMANUAL GOLDBERGER, BETTY TAYLOR, WILSHIRE PARK CIVIC CLUB, and SHANKMAN HILL CIVIC CLUB, separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor, et al,
Defendants

ORDER ON MOTIONS TO DISMISS

Plaintiffs allege that they are citizens of Memphis and that two civic clubs, Wilshire Park and Shankman Hill, also plaintiffs, are unincorporated associations of "similarly situated persons." They sue the City of Memphis, the City Council, and the Chairman of the City Council on the following asserted bases:

(1) 28 U.S.C. 1343(3) to redress the deprivation, under color of state legal action, of constitutionally secured personal and property rights;

(2) 42 U.S.C. 1982 to insure that all persons have same rights and enjoyments as those of white citizens;

(3) 28 U.S.C. 2201 for declaratory judgment. Specifically, plaintiffs complain about two specific actions of the City Council and/or the Mayor in "striking from municipal budget . . . a $750,000 federal-state financed

Community Center in plaintiffs' neighborhood," and "in closing through traffic access to West Drive between Jackson Avenue and North Parkway." They seek mandatory relief from the Court to correct these allegedly unconstitutional acts and violations of their civil rights.

Defendants have filed a motion to dismiss on the basis of asserted lack of jurisdiction in the Court, and because no substantial cause of action arising under the laws or Constitution is alleged. First attention is given to the prospective closing of West Drive.[1]

I. WEST DRIVE CLOSING AT NORTH END

It may be deemed to have been a moot issue relative to the closing of West Drive at its northern terminus, Jackson Avenue, since no actual impediment to passage at this point has been erected, except that a declaratory judgment as to the rights of the parties might be appropriate if the Court has jurisdiction of this cause of action and these parties for any purposes. 42 U.S.C. 1982[2] came into being after the Civil War to prohibit discrimination against negroes in the inheritance, purchase, sale, holding or conveying of property. *Hurd v. Hodge*, 334 U.S. 24 (1948); *Jones v. Mayer Co.*, 392 U.S. 409 (1968). These cases gave a broad construction to the language of the statute. Nowhere, however, has this language been construed to confer property rights to Negroes *beyond* those which belong to white citizens. None of the plaintiffs

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1. At the hearing it was disclosed that West Drive had not actually been closed, but plaintiffs protest the resolution authorizing the closure at Jackson Avenue.

2. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

on West Drive;[3] none are deprived of reasonable ingress and egress to their property; the street is not proposed to be closed to blacks and open to whites. In short, the effect of the proposed closing, whether wise or unwise, is the same upon whites as it is to blacks. *Palmer v. Thompson,* 403 U.S. 217 (1971). There is no facial discriminatory import to the resolution of closure, and there is no assertion that it will be implemented or administered in a racially discriminatory fashion or effect. Plaintiffs complain only that they will be denied access to West Drive from the north just as every other citizen will be. Attached to this Order is a city map showing the location of the area in controversy. It shows that by a very short detour to the east or west via Charles or Cypress Drive, one may proceed southwardly from Jackson Avenue towards North Parkway via a portion of West Drive, and that within approximately one quarter to a half mile east or west of West Drive there are "through streets"[4] providing non-stop direct routes from Jackson to North Parkway without an intervening stop or bends or curves as on West Drive. See *Mandell v. Commissioners of Bernalillo Co.,* 99 P(2d) 108, 4 NM 109 ( ). Plaintiffs also contend that there was no "public notice" of the action taken with regard to the resolution. Regardless of this contention, which the Court does not reach, this attempted attack upon the right to close the access to West Drive at one end of this approximately one-half mile long road is unavailing. Plaintiffs as "citizens" who do not assert themselves to be contiguous or adjacent property owners, have no such public property right in the entry to a street, which is not alleged to be

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3. The nearest named plaintiff lives, according to the City Directory, many blocks from West Drive. A number of others claiming to be interested in a letter to the Court live at least four blocks away.

4. [Trezevant] and University.

essential to them for any purpose, to petition this Court to require it to remain open for their possible convenience. Plaintiffs have no standing for this purpose. Plaintiffs have not been denied their interstate right to travel, or their "equal utilization, without discrimination upon the basis of race, of any public facility" or to travel freely upon *interstate* highways or other instrumentalities as in *United States v. Guest*, 383 U.S. 745, 757 (1966). This is not a case of asserted discrimination against blacks in deprivation of necessary public instrumentalities, such as utilities or paved streets, or of unequal treatment in the furnishing of these essential instrumentalities. Plaintiffs have failed to state a cause of action with respect to the purported West Drive closure, as and if effectuated, whether on the basis of racial discrimination or on the basis of unequal protection of rights. "Subject to the limitations contained in the Constitution . . . the power of a state to vacate streets or other public ways within its borders is plenary and absolute, and this power may be exercised by the state legislature or may be delegated to a municipal corporation. . . ." 64 C.J.S., *Municipal Corporations*, Sec. 1665. See *Cash & Carry Lbr. Co. v. Olgiatti*, 215 Tenn. 287, 385 S.W.2d 115 (1964).

Plaintiffs have no constitutional property rights in continued access to West Drive under the facts asserted or on the basis asserted in the complaint. They have no standing as affected property owners on the street to due process notice and hearing.

"In the absence of an allegation of fraud or a manifest abuse of discretion, courts will not inquire into the motives of municipalities for vacating a municipal street." *Sweetwater Valley Mem. Park v. City of Sweetwater*, 372 S.W.2d 168 (Tenn. 1963) cited in *Cash & Carry Lbr. Co. v. Olgiatti, supra*, 385 S.W.2d 117.

Whether or not the state or local statutory procedure in bringing about the alleged impending closure was followed is a state court matter not a federal question concerning which this Court has jurisdiction. See *Byington v. Bass,* 11 Tenn. App. 569, 572 (1930) holding that the general public, not relying upon subdivision representations, have no such property right as claimed by plaintiffs in a street similar to West Drive.[5]

II. STRIKING COMMUNITY CENTER BUDGET ITEM

Plaintiffs ask that the Court "by mandatory orders . . . specifically provide fundamental services and allocate governmental funds (a) to construct and federally finance or otherwise pay for a $750,000 community center in plaintiffs' neighborhood. . ." Again, with reference to the city map hereinabove made reference to, the Court notes that within the area described that plaintiffs "as a class" reside, it is noted that there are three city parks of substantial size and another community facility (Klondike) lying just west of Watkins.[6] Dave Wells Community Center is also situated in North Memphis less than a mile from the western boundary of the area described as that in which plaintiffs assert a special interest. Plaintiffs assert that defendants in February "unlawfully prevented, and . . . continue to prevent the budgeting, planning, funding, and construction of a $750,000 federal and state financed community center." They also claim that their civil rights and prop-

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5. Plaintiff Greene's amended complaint goes into detail with regard to notice and a public hearing prior to the closure of West Drive, though he was dissatisfied with the conclusion the Memphis City Council reached.

6. University Park is about one-half mile from plaintiff Greene's residence; Gooch Park is little more; and May Park is within a mile.

erty rights and their "property-linked benefits and enjoyments" are damaged and deprived.

Apparently, by inference, plaintiffs claim that the defendants' failure to construct the community center equates to deprival of "basic human necessities," and deprivation of equal protection. Plaintiffs quote from *Beal v. Lindsay*, citation unknown, that availability of distant parks is not a consideration. The location of other nearby parks and recreation or community facilities is a matter of proper consideration and the Court takes judicial notice of the location of them on the attached map.

Nowhere in the complaint is it stated that the City's alleged failure to act was discriminatory to blacks, or to the poor, or how this amounted to a violation of equal protection. Assertion of not budgeting, planning, funding, or constructing a community center without any assertion of pertinent circumstances as to comparative or unequal treatment with relation to other citizens of the larger community does not state a cause of action for racial discrimination nor of a constitutional violation. *Gautveaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), cited by plaintiffs, relates to the refusal of Chicago authorities to locate public housing projects in white neighborhoods. There is simply no assertion in this complaint relating to housing project discrimination of the type involved in that case. *Feliciano v. Romney*, 363 F.Supp. 656 (S.D. N.Y. 1973) is similarly inapplicable as dealing with alleged failure under a number of federal statutes to relocate after eviction proceedings had been instituted in an area of Harlem.[7]

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7. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968) is similarly inapplicable. Plaintiff also relies on *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); en banc, 461 F.2d 1171 (1972) which dealt with discrimination

(Continued on following page)

The determination whether to build and when or where to build a community center is essentially a political discretionary decision of City of Memphis officials. No allegation is made to indicate any constitutional deprivation in the decision made with respect to February, 1974. "Federal Courts are reluctant to enter the field of local government operations." *Hawkins v. Shaw*, 461 F.2d 1173. Compare *Coleman v. Aycock*, 304 F.Supp. 132 (N.D. Miss. 1969) which ordered racial desegregation of public facilities but held no need for the court to interfere with municipal operations relating to fire hydrants, paving streets, police protection, drainage, and the like. "The governing authorities of a municipality in the provision of public services and the operation of public facilities are entitled to the widest discretion, and the Courts should not undertake to control or interfere with the exercise of such discretion in the absence of bad faith or abuse." *Supra*, 304 F.Supp. 146. No allegation of bad faith or gross abuse of discretion is made in this complaint. Indeed, Greene's amended complaint sets out in detail that the Council and defendants heard their contentions about the need for a community center in the [Vollintin]-Evergreen area and declined, after discussion and consideration, to insert that item in this year's budget. (There is in the amended complaint admittedly no basis for the conclusion in the original complaint that such community center would be federally and state financed.) A court does not ordinarily look to the motives of the legislature or munic-

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Footnote continued—

in service of necessities to a majority black population in a Mississippi town that had historically deprived them of necessities such as paved streets, street lights, sanitary sewers, water mains or drainage, and fire hydrants. That case dealt "only with the town of Shaw, Mississippi, and the facts as developed in the record." 461 F.2d 1173. The Court noted a significant change in the situation with election of a black councilman. Memphis had at the time the suit was brought three black councilmen.

ipal council in adopting a law or ordinance of the kind under consideration. *Palmer v. Thompson, supra.*

Under any circumstances, however, the Court does not have the authority to order by way of mandamus defendants to do any act, non-ministerial or discretionary in its nature, such as requiring the City or defendants to plan and construct a community center. *Tannery Bass Anglers Sportsman's Society v. Scholze,* 329 F.Supp. 339, 350 (E.D. Tenn. 1971). This is not to say that the Court may not in a proper case order certain acts be done or not to be done to effect an end to prohibited discrimination, or to provide due process or equal protection in appropriate situations. The complaint or amended complaint fails to state a cause of action and should be dismissed except as to paragraph 11, Part II (page 15) of the amended complaint. This one section asserts that the actions of the City since 1970 in building community centers has demonstrated racial bias or prejudice. While the Court denies the relief requested in the form originally sought, it will proceed in this cause on the sole issue raised as to whether defendants since 1970 have, in fact, demonstrated racial bias in construction of community centers. Plaintiffs may be able to prove a set of facts in support of their claim (if it is "ripe" and if they have standing) which may entitle them to some relief. There is no constitutional notice or hearing issue, however, before the Court.

Except to the extent indicated in the last paragraph above, defendants' motion to dismiss is granted.

This 4th day of October, 1974.

/s/ Harry W. Wellford
United States District Court Judge

(Decided May 13, 1976)

N. T. GREENE, et al.,
Plaintiffs-Appellants,

vs.

CITY OF MEMPHIS, a Municipal Corporation, et al.,
Defendants-Appellees.

No. 75-1339.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 13, 1976.

Decided May 13, 1976.

Action was instituted against city and various of its officials for alleged unlawful closing of street. The United States District Court for the Western District of Tennessee, Western Division, Harry W. Wellford, J., dismissed complaint for failure to state a claim, and one plaintiff appealed. The Court of Appeals, John W. Peck, Circuit Judge, held that complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council.

Reversed and remanded.

1. Civil Rights (Key) 13.12(3)

Complaint averring that closing of street pursuant to authority of mayor and council chairman conferred certain

benefits, to wit, privacy and quiet of an exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods was sufficient to state a claim for relief under civil rights statutes against mayor and council chairman, but was insufficient to state a claim against city or its council. 42 U.S.C.A. §§ 1982, 1983.

2. Federal Civil Procedure (Key) 674

That individual plaintiff failed to specifically allege a claim under statute covering deprivation of civil rights did not operate to preclude him from recovering on that claim in event allegations showed and proof supported claim. 42 U.S.C.A. § 1983.

3. Civil Rights (Key) 13.13(1)

To establish that closing of street by city officials conferred certain benefits, to wit, privacy and quiet of exclusive dead-end street, on white residents of area that city had refused to confer on similarly situated black neighborhoods, plaintiff was required to prove that city officials conferred closed street on residents of area because of their color; he was also required to prove racial motivation, intent or purpose, in absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. 42 U.S.C.A. §§ 1982, 1983.

Raymond P. Gibbs, Murfreesboro, Tenn., for plaintiffs-appellants.

Joseph B. Dailey, Asst. City Atty., Charles V. Holmes, Memphis, Tenn., for defendants-appellees.

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

JOHN W. PECK, Circuit Judge.

Plaintiffs Greene, Goldberger, Taylor, Wilshire Park Civic Club, and Shankman Hill Civic Club charged in their district court complaint that defendants-appellees City of Memphis, its Mayor, its Council, and its Council Chairman unlawfully closed West Drive to through traffic and unlawfully deleted from the municipal budget a joint-funded $750,000 community center. By amended complaint, Greene charged that City had since 1970 located seven community centers on racial bases and closed West Drive on racial bases. The district court granted appellees' motion to dismiss, for failure to state a claim, Fed.R.Civ.P. 12(b)(6),[1] the West Drive and budget deletion claims, and Greene "petition[ed] for [an] interlocutory appeal." Prior to the district court's certifying such petition, the district court proceeded to a non-jury trial of the community center location claim, which was dismissed with prejudice at the conclusion of Greene's proof. Greene thereafter filed a notice of appeal.

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1. Although appellees moved to dismiss also for lack of jurisdiction over the subject matter, Fed.R.Civ.P. 12(b)(1), and although the district court simply granted appellees' "motion to dismiss," subject matter jurisdiction under 28 U.S.C. § 1343(3) would have attached if a 42 U.S.C. § 1983 claim were stated. *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976); *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975). Likewise, if Greene had stated a 42 U.S.C. § 1982 claim, there was subject matter jurisdiction under 28 U.S.C. § 1343(4). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n. 1, 88 S.Ct. 2186, 2189 n. 1, 20 L.Ed.2d 1189, 1192 n. 1; *Jennings v. Patterson*, 460 F.2d 1021, 1022 (5th Cir. 1972); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1387 (M.D.N.C.1972). It follows that the district court dismissal was for failure to state a claim, Fed.R.Civ.P. 12(b)(6).

On appeal, Greene[2] claims that the district court erred in granting the motion to dismiss. We agree. Axiomatically,

> "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974), quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1975).

Scheuer emphasized that

> "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96.

Accord, *Dunlap v. State of Tennessee,* 514 F.2d 130, 133 (6th Cir. 1975).

[1] We view Greene as having stated claims under 42 U.S.C. § 1982 and 42 U.S.C. § 1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by

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2. Although the court of appeals docket sheet styles Greene, Goldberger, Taylor, Wilshire Park Civic Club and Shankman Hill Civic Club as plaintiffs-appellants, "[p]laintiff, N. T. Greene," through his attorney, filed the petition for interlocutory appeal and notice of appeal. Similarly, the appellate brief refers to "appellant." The use of the singular apparently is significant in light of a letter in the record indicating the decision of a "Committee to Reopen West Drive" to "separate" its "petition" from Greene's "petition." Because the complaint prays for equitable relief ordering the city officials to keep West Drive open, rather than for damages, whether there is one, or more than one, appellant is for present purposes insignificant. See *Craft v. Memphis Light, Gas & Water Division,* 534 F.2d 684, 685-687 (6th Cir., filed April 12, 1976).

white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright*, 532 F.2d 552, 553 (6th Cir., filed March 23, 1976), citing *Scheur, supra*, 416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96, reasonably aver that the closing confers certain benefits, *to wit*, the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. Though we have found no section 1982 case on-point, the liberal construction that courts have afforded section 1982 buttresses our conclusion that Greene has stated a section 1982 claim. See, e. g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Jennings v. Patterson*, 460 F.2d 1021 (5th Cir. 1972), 488 F.2d 436, 442 (5th Cir. 1974); *Battle v. Dayton-Hudson Corp.*, 399 F.Supp. 900, 905 (D.Minn.1975).

[2] That Greene failed to specifically allege a section 1983[3] claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e.g., *Janke Const. Co. v.*

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3. Neither the complaint nor amended complaint mentions section 1983, but both allege jurisdiction through 28 U.S.C. § 1343(3), the jurisdictional counterpart of section 1983. The amended complaint also generally tracks the language of section 1983 in alleging that

> "[d]efendant's actions deprived plaintiff and others of their property rights without due process of law and equal protection of the law as protected by the Fourteenth Amendment. . . ."

Vulcan Materials Co., 527 F.2d 772, 776-77 (7th Cir. 1976), *aff'g* 386 F.Supp. 687, 692 n. 3 (W.D.Wis.1974); *Ailshire v. Darnell*, 508 F.2d 526, 528 (8th Cir. 1974); *Parr v. Great Lakes Express Co.*, 484 F.2d 767, 773 (7th Cir. 1973); *United States v. Martin*, 267 F.2d 764, 771 (10th Cir. 1958); *Dotschay v. National Mut. Ins. Co.*, 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

Of course, no section 1983 claim is stated against the City of Memphis or its Council. See *Amen v. City of Dearborn*, 532 F.2d 554, 558-559 (6th Cir. 1976).

The district court, in dismissing, relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), which sustained closing of municipal swimming pools against equal protection challenges because the closings prevented whites and blacks equally from utilizing municipal swimming pools. Accord, *Mahaley v. Cuyahoga Metropolitan Housing Auth.*, 500 F.2d 1087, 1092-93 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975). Similarly, the closing of West Drive, as the district court noted, affects Greene "just [like] every other citizen," white and black, by "deny[ing] access to West Drive from the north." Yet as noted above, the complaints also reasonably allege that the city has conferred certain benefits on white residents of West Drive, though refusing to confer those benefits on similarly situated black neighborhoods, thereby falling within the *Palmer* caveat that

> "[s]hould citizens of . . . [any] city be able to establish in court that public, tax-supported swimming pools are being denied to one group *because* of color and supplied to another, they will be entitled to relief." 403 U.S. at 227, 91 S.Ct. at 1946, 29 L.Ed.2d at 446 (emphasis supplied).

Similarly, the complaint falls within *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971), 461 F.2d 1171 (5th Cir. 1972) (*en banc*), which condemned the conferral of municipal services on racial bases.

We recognize that the allegations nowise approach the egregiousness of the facts found in *Town of Shaw,* and endorse the *Town of Shaw* caveat that it is not to be

> "impl[ied] or suggest[ed] that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record." 461 F.2d at 1173.

See *Towns v. Beame,* 386 F.Supp. 470 (S.D.N.Y.1974) (even assuming that the closing of eight fire companies had disproportionate impact on racial minority response areas, no "sufficiently serious" question of equal protection to justify preliminary injunction, where fire department has satisfactorily rebutted plaintiffs' prima facie case of racial discrimination by proving non-racial rationale for closings).

[3] To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motiva-

tion. Compare *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968), and *Kelly v. Romney,* 316 F.Supp. 840, 844 (S.D.Ohio 1970), with *Town of Shaw, supra.* See also *Bronson v. Board of Educ.,* 525 F.2d 344, 347-49 (6th Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976).

This view does not conflict with *Palmer, supra,* which noted that "no case in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). See *Citizens Comm. for Faraday Wood v. Lindsay,* 507 F.2d 1065, 1070 n. 11, 1074 n. 6 (2d Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1679, 44 L.Ed.2d 102 (1975), and accompanying text. In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

In reversing, we, of course,

> "intimate no evaluation whatever as to the merits of [Greene's] claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of [his] respective complaints, [Greene was] entitled to have them judicially resolved."

Scheuer, supra, 416 U.S. at 250, 94 S.Ct. at 1693, 40 L.Ed.2d at 105.

Reversed and remanded.

(Filed June 7, 1976)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

(Title Omitted in Printing)

ANSWER OF DEFENDANTS

Pursuant to the decision of the United States Court of Appeals decided and filed May 13, 1976, defendants file the following answer and response concerning the issues remaining in the lawsuit as set out in the opinion of the Court.

1. The complaint fails to state a cause of action against the defendants upon which relief may be granted.

2. Defendants deny that the closing of West Drive confers benefits on residents of West Drive that the City has refused to confer on similarly situated black neighborhoods.

3. Defendants deny that City officials conferred the closing of the northern entrance/exit of West Drive on West Drive residents because of their color or that such action was in any manner based upon racial motivation.

4. Defendants deny that black citizens of Memphis have been denied the opportunity to acquire such dead end streets in their neighborhoods because of their race.

5. Defendants deny that the Mayor and the then Council Chairman Edwin McBrayer have conferred benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets.

6. Defendants say that the citizens of any neighborhood making application to the City Council to acquire such a

dead-end street have been, are presently, and will be treated with equal consideration, with the racial makeup of the area having no bearing upon such application.

All remaining allegations contained in the original or amended complaint neither admitted nor denied are now specifically denied.

/s/ Arthur J. Shea
Arthur J. Shea
Assistant City Attorney
/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney
Room 314, 125 North Main
Memphis, Tennessee 38103

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

MOTION TO INTERVENE AS PLAINTIFF

Plaintiffs - Applicants for Intervention, pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure, through their attorneys, move for leave to intervene as plaintiffs in this action, in order to assert the claims set forth in their proposed complaint, a copy of which is hereto attached, on the grounds that:

(a) The Applicants claim an interest relating to the property or transaction which is the subject of the action and they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest.

(b) The Applicants claims and the main action have questions of law and fact in common.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis & Shelby County Legal Services
325 Dermon Bldg., 46 N. Third Street
Memphis, Tennessee 38103
526-5132
Attorney for Applicants for Intervention

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs move the Court for leave to file an amended complaint, a copy of which is hereto attached as Exhibit A, on the grounds that the original complaint failed to include the names of the following plaintiffs, Edwin Owens, Elnora Priest Cross, and Carolyn Burse.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis & Shelby County Legal Services
325 Dermon Bldg., 46 N. Third Street
Memphis, Tennessee 38103
526-5132
Attorney for Plaintiff

(Certificate of Service Omitted in Printing)

(Filed March 29, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

AMENDED COMPLAINT OF PLAINTIFF'S COMPLAINT FOR INTERVENTION

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343 (3) and (4) and 28 U.S.C. §2201. This action is brought pursuant to the Thirteenth and Fourteenth Amendments of the United States Constitution to redress the deprivation of rights, privileges, and immunities secured thereby. This action is also brought pursuant to 42 U.S.C. §1982 and §1983, to enforce the right of Plaintiffs to inherit, purchase, lease, sell, hold and convey real and personal property on the same basis as white citizens and for the deprivation of rights, privileges, and immunities secured by the Constitution and laws.

II

This is a suit for injunctive and other affirmative relief from discrimination, prohibited [by] the Thirteenth Amendment to the Constitution of the United States and 42 U.S.C. §1982. Plaintiffs also seek damages, declaratory and injunctive relief against discrimination, which discrimination has resulted in the denial of equal protection of the laws and due process of law guaranteed under the Fourteenth Amendment to the constitution of the United States and 42 U.S.C. §1983.

III

Plaintiffs Cross, Burse, and Owens are black citizens and residents of Memphis, Shelby County, Tennessee. Cross resides approximately one and one half miles from West Drive, specifically at 1303 Smith Avenue. Plaintiff Owens resides at 1408 N. Bellvue, also situated approximately one and one half miles from West Drive. Burse resides at 1238 Weakley Drive, approximately one mile from West Drive.

Burse, Cross, and Owens object to the closing of the West Drive.

IV

Plaintiffs bring this action on their own behalf, and pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure on behalf of similarly situated black citizens seeking to enjoin the closing of West Drive to through traffic. Such black citizens have been deprived of the right to inherit, purchase, lease, sell, hold, and convey real and personal property on the same basis as white citizens as a result of the approval of street closings by the Defendants on the basis of race or color. The class represented by Plaintiffs is so numerous that joinder of all members is impracticable; there are general facts of law common to the class; the claims or defenses of Plaintiffs will fairly and adequately protect the interests of the class. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

V

On July 9, 1973 application was made by residents of the Hein Park Civic Association for closing a portion of West Drive, to wit:

Beginning at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginnings as shown on the attached plat.

VI

Plaintiffs allege that Defendant's, [sic] on the basis of race, have deprived them of the right to inherit, purchase, lease, sell, hold, and convey real and personal property on the same basis as white citizens. The closing of West Drive at the north end will result in the dead ending of that street conferring upon white residents of West Drive and Hein Park certain benefits not available to blacks living in adjoining and surroundings streets, benefits which inure to white citizens in the form of increased property values, solitude, safety, and better environmental quality in general for the residents of West Drive and Hein Park. Defendant's decision to close West Drive was done in contravention of established procedures with the full purpose and intent of depriving Plaintiffs of their constitutional right to equal protection and due process.

VI

On the basis of race, Defendants will continue to deny blacks the right to inherit, purchase, lease, sell, hold, and convey real property and as well as to deprive them of rights, privileges and immunities secured by the Constitution and laws of the United States.

Plaintiffs have no plain adequate or complete remedy at law. They are suffering and will continue to suffer irreparable injury because of the racially discriminatory policy, practice, custom and usage of Defendants.

VII

As a direct and proximate result of the wrongful acts by the Defendants, Plaintiffs have suffered actual damages in an amount to be proven at trial and will continue to suffer damages by the Defendants' decision to close the north end of West Drive, without adequate notice and hearing procedures, on the basis of the racial makeup of that community in deprivation of Plaintiffs' constitutional and statutory rights to inherit, purchase, lease, sell, hold and convey real and personal property without regard to race.

VIII

WHEREFORE, Plaintiffs respectfully pray that this Court will render judgment for the Plaintiff as follows:

1. Granting Plaintiffs and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them, from maintaining discriminatory policies and practices against Plaintiffs and the class they represent by the closing of West Drive and ordering the building of sidewalks, curbs, and gutters, along West Drive.

2. Granting Plaintiffs and the class they represent a declaratory judgment that the acts, policies, and practices of defendants complained of herein violate the Thirteenth and Fourteenth Amendments to the United States Constitution and the provisions of 42 U.S.C. Sections 1982 and 1983.

3. Granting Plaintiffs a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them from denying Plaintiffs the right to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoined by white citizens.

4. Granting Plaintiffs damages against defendants to compensate for property value decreases.

5. Granting Plaintiffs judgment against Defendants, and each of them jointly and severally, for punitive or exemplary damages.

6. Awarding Plaintiffs their costs herein.

7. Awarding Plaintiffs reasonable attorneys' fees.

8. Granting Plaintiff and the class they represent such further, additional and different relief as the Court may deem just and proper.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Memphis and Shelby County Legal Services Association
46 North Third Street
Memphis, Tennessee 38103
901-526-5132
Attorney for Plaintiff

(Filed April 11, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation; WYETH CHANDLER as Mayor of the City of Memphis; THE COUNCIL OF THE CITY OF MEMPHIS; and EDWIN McBRAYER as Chairman of the Council of the City of Memphis;
Defendants,

ELNORA PRIEST CROSS, EDWIN OWENS, and CAROLYN BURSE,
Applicants for Intervention.

ORDER GRANTING MOTION TO INTERVENE AS PLAINTIFFS

Plaintiffs-Applicants for Intervention, Elnora Priest Cross, Edwin Owens, and Carolyn Burse, have moved the Court pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure for leave to intervene as plaintiffs in this cause in order to assert the claims as set out in their proposed Complaint. Plaintiffs-Applicants seek injunctive and other relief against alleged discrimination in violation of 42 U.S.C. §1982 and §1983, the Thirteenth and Fourteenth Amendments to the United States Constitution, and for declaratory relief pursuant to 28 U.S.C. §2201. The Motion to Intervene is not opposed.

It appearing that the applicants claim an interest relating to the property or transaction which is the subject of this action and that they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interest; and it further appearing that the Applicants' claims and the main action contain questions of law and fact which are in common;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiffs-Applicants for Intervention, Elnora Priest Cross, Edwin Owens, and Carolyn Burse, are hereby allowed to intervene in this action, to file their Complaint for Intervention, and to protect their interests as declared therein.

The Motion to Intervene having been granted, it is FURTHER ORDERED that plaintiffs' Motion for Leave to File Amended Complaint so as to add the intervening parties as parties to the original action is hereby denied as moot.

ENTER: This 21st day of April 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Filed May 24, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

JOINT MOTION OF PLAINTIFF-INTERVENORS AND PLAINTIFFS N. T. GREENE, ET AL. TO AMEND COMPLAINT IN INTERVENTION AND SECOND AMENDED COMPLAINT RESPECTIVELY

Plaintiff Intervenors through their attorneys and Plaintiff N. T. Greene, Pro Se, move this Court to amend and supplement their complaints previously filed herein in the following particulars; Amending Plaintiffs' Second Amended Complaint, Paragraph I, and amending Plaintiffs Intervenors' Complaint in Intervention Paragraph IV as follows;

1. That, historically, the general area known as Hein Park in the City of Memphis, Tennessee has been an [sic] predominantly white well-to-do area and that the white residents of said area with the support and acquiescence of defendant City officials and their predecessors in office have sought to preserve the all white nature of said area free from all incursions by black residents into said area;

2. That for black residents of Springdale Street and other areas to the north of West Drive, said Drive is a public way through Hein Park and is a direct and essential route of access to Snowden School, a public school, and the north entrance to Overton Park, a public park,

and said way is traversed mainly by black youth and other blacks traveling to the aforementioned point.

3. That the residents of West Drive and surrounding areas opposed, and always have opposed, such incursions by the aforesaid blacks;

4. That in support of and as an integral part of such opposition that white residents of West Drive who own property abutting said public way have failed, refused, and/or neglected to install sidewalks as required by City policy and that Defendant City officials have been in active concert with such refusal and have, through deliberate inaction and otherwise aided and abetted the failure, refusal or neglect to install such sidewalks;

5. That such conduct and/or inaction constitute(s) State action which has had and still has the effect of maintaining the all white nature of West Drive to the detriment of the black class members in this action because in traversing West Drive said blacks are subjected to traffic perils of having to walk in the public way;

6. That the aforementioned acts by defendant City officials have all been perpetrated on the basis of race.

The grounds for this motion are as follows:

(a) That by order, dated May 9, 1977, the Court ordered the Plaintiffs herein to file additional pleadings amplifying their allegations with regard to the sidewalk issue. This Court has the authority to allow such an amendment although no motion for a more specific statement has been filed. *U.S. v. Sinclair Refining Company*, 126 F.2d 827, 830 (10th Cir., 1942).

(b) The amendment to the Plaintiffs' complaints will not cause any prejudice to the Defendants in maintaining their defense on the merits of this case.

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
Memphis, Tennessee 38103

/s/ Brother Greene
Brother N. T. Greene, Pro Se
1074 Terry Circle
Memphis, Tennessee 38107
Attorney for Plaintiff-Intervenors

(Certificate of Service Omitted in Printing)

(Filed Sept. 27, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

ANSWER TO PLAINTIFFS' COMPLAINT FOR INTERVENTION AS AMENDED

Come now the defendants and for answer to the Second Amended Complaint, as amended, and the Complaint for Intervention, as amended, state the following:

FIRST DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction to hear this cause as there is no substantial federal claim alleged against the defendants.

THIRD DEFENSE

In Civil Action No. 74-565, brought by N. T. Greene, Willie Jackson and Virginia Donaldson against the City of Memphis, Wyeth Chandler, Edwin McBrayer, the Council of the City of Memphis, and Frank Palumbo, it was alleged that the City of Memphis failed to provide public sidewalks on both sides of West Drive from Jackson Avenue South to North Parkway. See Exhibit #1.

Upon motion of the defendants, the United States District Court for the Western District of Tennessee, Western Division, dismissed the complaint on December 30, 1974, stating that such problems are political legislative problems as to which there is no legally cognizable claim in this Court and to which the Court has no jurisdiction. See Exhibit #2.

It is the contention of the defendants herein that the ruling of the Court in Civil Action No. 74-565 is *res judicata* as to the issue of requiring the City of Memphis to immediately construct curbs, gutters and sidewalks on West Drive.

FOURTH DEFENSE

In response to the factual allegations of the Second Amended Complaint, as amended, and the Complaint for Intervention, as amended, that are still at issue before this Court, defendants would say as follows:

1. Pursuant to the Court's ruling the defendants regard the factual allegations of the Second Amended Complaint as superceded [sic] by the Joint Amendment filed by the plaintiffs in this action, and, therefore, do not address themselves to the allegations contained in the Second Amended Complaint.

2. Defendants have no knowledge as to the residence of the plaintiffs, and, therefore, neither admit nor deny

the allegations set forth in Paragraph III of their Complaint for Intervention, but demand strict proof thereof.

3. Defendants deny the allegations set forth in Paragraph IV of the Complaint for Intervention and further deny the allegations set forth in paragraphs 1, 2, 3, 4, 5 and 6 of the Amendment to the Complaint for Intervention filed.

4. Defendants admit the allegations set forth in Paragraph V of the Complaint for Intervention.

5. Defendants deny the allegations set forth in both paragraphs that are numbered VI (there are two paragraphs marked VI) and also those in Paragraph VII of the Complaint for Intervention.

6. All allegations not heretofore specifically admitted or denied are now denied as if specifically denied.

WHEREFORE, defendants pray that the Court dismiss the Amended Complaints, render judgment in favor of defendants on all issues remaining before the Court, and allow the defendants to to [sic] hence with their reasonable costs.

Respectfully submitted,

/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney
/s/ Michael C. Speros
Michael C. Speros
Assistant City Attorney
Room 314 City Hall
125 North Main St.
Memphis, TN 38103
Attorneys for Defendants

(Certificate of Service Omitted in Printing)

Exhibit #1

(Filed November 6, 1974)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

CIVIL ACTION NO. C-74-565

WILLIE LEE JACKSON, N. T. GREENE and VIRGINIA DONALDSON, Separately and on behalf of all others similarly situated,
Plaintiffs,

vs.

CITY OF MEMPHIS, a municipal corporation, WYETH CHANDLER as Mayor of the CITY OF MEMPHIS, and EDWIN McBRAYER as Chairman of the Council of the CITY OF MEMPHIS, and FRANK P. PALUMBO as Chief Engineer and Director of Public Works of the CITY OF MEMPHIS,
Defendants.

This case assigned to HARRY W. WELLFORD, JUDGE.

Complaint, Request to the Court for Order to Show Cause Why an Immediate Mandatory Order to Correct These Conditions Should Not Be Issued Promptly.

1. This is a Class Action Suit.

2. This action arises under the United States Constitution and Bill of Rights, 1st, 9th and 14th Amendments and other applicable laws.

3. The City of Memphis has the duty under the Constitution and laws of the State of Tennessee to live up to its established high standards and provide safe and sanitary conditions for the school children and other citizens of Memphis.

4. Failure of the city government to take the necessary permanent corrective measures to prevent raw human sewage from backing up and overflowing into the boiler room, halls and auditorium adjacent to and below the lunch room and kitchen in Cypress Junior High School for the "past few years." SOURCE: Memo annexed hereto date 3/21/74.

5. Failure of the city government to take permanent corrective action to remove the cause for the raw sewage relief valve "carrying sewage overflow into Cypress Creek" which is adjacent to a residential community and said relief valve is less than ¼ mile from Cypress Junior High School. SOURCE: Memphis and Shelby County Health Department Study dated 11/13/72.

NOTE: Sewage from the relief valve floats just past Cypress Junior High School less than 40 feet from where students are on the north side of that building. Said overflow is almost continuous.

6. Failure to take permanent corrective action to stop "continuous" or "periodic sewage contamination" of Overton Bayou which flows on two sides (west and south) of Cypress Junior High School and the adjacent residential community.

SOURCE: Memphis and Shelby County Health Department Study dated 11/13/72 annexed hereto.

7. Failure to take permanent corrective action to stop sewage from "overflowing from manholes" in the "large lake like sump area" of N. Watkins Street and Chelsea Avenue when the river is high. SOURCE: Memphis and Shelby County Health Department Study dated 12/7/73 annexed hereto.

8. Failure to permanently remove the cause of raw sewage "running into Cypress Creek at N. McLean and

Cypress Creek." SOURCE: Letter, Stanley Black dated 11/6/72 annexed hereto.

9. Failure to provide public sidewalks on both sides of University Street from Cypress Junior High School to Chelsea Avenue. Gooch Park is located on the corner of Hunter and University which is between Cypress Junior High School and Chelsea Avenue.

Note: City law requires as first priority sidewalks on streets leading to and from schools. The second priority is given to streets leading to and from parks. City law copy annexed hereto.

10. Failure to provide public sidewalks on both sides of West Drive from Jackson Avenue south to N. Parkway to increase the safety of the children who live on West Drive and attend Snowden Junior High School.

a. Note: Many parents who live on West Drive have sought to "increase the safety to the many children who live in the subdivision (Hein Park) and those who use the subdivision to walk to Snowden Junior High School." Petition dated 7/9/73 annexed hereto.

b. Note: The number two priority for sidewalks are streets leading to parks and playgrounds. The only entrance to Overton Park and the Overton Park Zoo on the north side is at N. Parkway near West Drive. City law copy annexed hereto.

c. Note: According to the Principal at Snowden Junior High School many of his students daily violate the trespass law by using the campus of Southwestern University seeking a safe route to and from Snowden Junior High School. Taylor letter of 9/9/74 annexed hereto.

11. The plaintiffs are citizens of the United States and residents of the city of Memphis, Shelby County, State

of Tennessee. All of the plaintiffs, named and unnamed, have a personal and social interest in the immediate, permanent solution to the listed violations of our rights.

12. There has been at least one serious outbreak of a disease, encephalitis, in the north Memphis area in recent months. Exactly to what extent that disease and other illnesses have affected the children of Cypress Junior High School and the residents who live adjacent to Cypress Creek is not known to the plaintiffs at this time. Therefore, plaintiffs request damages for tests of all children currently enrolled in and who have attended in the last six years Cypress Junior High School of $300,000.00. Plaintiffs also request $40,000.00 for the medical testing of persons living adjacent to or very near Cypress Creek for the past six years. Attached hereto C.A. 9/25/74.

13. Failure to act on a special resolution passed by a majority of the members of the Board of Education of the City of Memphis asking the city government to take *EMERGENCY ACTION* on two of the above items (items #4 and #10). Resolution passed on September 23, 1974, copy annexed hereto.

Note: Traffic engineer's survey given to School Superintendent on 9/12/74 *prior* to September 23, 1974 but kept from board members. Copy annexed hereto dated 9/14/74.

14. On or about November 1, 1974 the defendants (City Council) refused to take the *EMERGENCY ACTION* requested by the Board of Education to remove the "hazardous conditions" that are a "clear and present danger to the lives of the students who attend those schools" and the general community.

Note: School Board Resolution dated 9/23/74 annexed hereto.

15. The Defendant City of Memphis is a political subdivision of the State of Tennessee and the municipal corporation duly administering and governing the properties and affairs of the people thereof, and the other defendants are the duly elected and acting executive and legislative officers, respectively of the City of Memphis.

16. State law requires that children *must* attend the schools.

17. The city government has failed to abide by the Constitution and laws of this State by failing to act positively on the request of Memphis Board of Education and the many requests of the affected citizens of the north Memphis to correct these very serious problems. Therefore, our rights have not been properly respected under the Articles and Amendments of the U.S. Constitution.

FINAL PRAYER

Plaintiffs further request other declaratory injunctive and equitable relief as this Court deems proper and necessary, together with Court cost and legal expense.

Respectfully submitted

Plaintiffs in person

/s/ Virginia Donaldson
1023 Springdale
Memphis, Tenn.

/s/ N. T. Greene
1074 Terry Circle
Memphis, Tenn.

/s/ Willie Lee Jackson
1615 May St.
Memphis, Tenn.

November 6, 1974

Exhibit #2

(Filed December 30, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

Civil C-74-565

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, et al.,
Defendants.

Memorandum Decision Dismissing Action

This matter was last before the court on motion of plaintiffs for appointment of counsel to represent them, and the court entered an order on December 27, 1974, denying the motion. In such order, the court stated that a motion to dismiss the complaint was pending and that the court would defer acting on the motion to dismiss to allow plaintiffs, with or without counsel, to respond to the motion. Since the entry of such order, plaintiffs have orally pointed out to the court correctly that they had in fact (on December 11) responded to the motion to dismiss, that they have no prospect of obtaining counsel, and that they desire that the court proceed to rule on the motion to dismiss.

In their complaint, plaintiffs allege that certain undesirable conditions—some of them having to do with improper sanitation—exist in North Memphis and that the defendant local authorities will not take action to correct such conditions. Defendants in their motion to dismiss

contend that the complaint does not state a claim for relief and further contend (and such contention is supported by affidavits and therefore, to that extent, is in effect a motion for summary judgment) that the defendants are in the process of correcting the sanitation conditions.

We conclude that plaintiffs have not, in their complaint, stated a basis for subject matter jurisdiction in this court and have not stated a claim for relief that is cognizable in this court. Plaintiffs simply complain that bad conditions exist in North Memphis, that it is the duty of the defendant local authorities to correct the conditions, that the local authorities have failed to do so upon demand, and therefore plaintiffs ask this court to order the local authorities to correct the conditions. This, then, is another example of the earnest citizen who, on the mistaken notion that the federal courts operate like Swedish ombudsmen, come into court and seek to lay the problem in the court's lap. It is small wonder, these days, that many citizens have such ideas. This problem, however, is a political-legislative problem as to which this court has no jurisdiction and as to which there is no legally cognizable claim in this court.

This court does not rule on defendants' contention that plaintiffs cannot *pro se* maintain a class action, though they can, as they have, maintain this action for themselves without counsel.

The Clerk will enter a final judgment dismissing this action.

ENTER this 30th day of December, 1974.

/s/ Bailey Brown
Chief Judge

(Filed October 3, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation, et al.,
Defendants.

ORDER GRANTING MOTION TO AMEND AND CERTIFICATION OF CLASS ACTION

The plaintiffs in this cause of action have jointly moved the Court to amend their respective Complaints, amplifying their allegations with regard to the City of Memphis's enforcement of its ordinances requiring sidewalks. In an Order dated May 9, 1977, this Court instructed plaintiffs to file a more specific statement concerning this issue. The Court finds that the plaintiffs have complied with these instructions.

Therefore, IT IS ORDERED that the specific allegations contained in this Motion shall hereby amend the Complaint in Intervention and the Second Amended Complaint heretofore filed in this action by the respective plaintiffs, and the defendants shall answer or otherwise respond to the amendments within twenty days from the date hereof.

In addition, the plaintiff/intervenors have moved the Court for certification of this action as a class action under FRCP 23. It appearing that all of the requirements of Rule 23(a) and 23(b)(2) have been met, and it further

appearing that opposing counsel does not object to this suit being maintained as a class action under the terms set out in the stipulation filed September 29, 1977. Therefore the class, as described in the above mentioned stipulation, is hereby certified as a plaintiff in this action.

ENTER: This 3rd day of October 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge

(Filed December 16, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Come now the defendants, Wyeth Chandler and Oscar Edmonds and in accordance with Rule 33 of the Federal Rules of Civil Procedure, hereby answer those interrogatories propounded to them by the plaintiff.

INTERROGATORY NO. 1

Does the City of Memphis, at the present time, intend to proceed with the closing of that section of West Drive which is the subject of this controversy?

ANSWER TO INTERROGATORY NO. 1

Yes.

INTERROGATORY NO. 2

If the answer to Interrogatory No. 1 is in the affirmative please provide the timetable for such closure.

ANSWER TO INTERROGATORY NO. 2

At the present time there is no actual timetable for the closure of West Drive other than to postpone such closure pending the outcome of this lawsuit. If the City is successful in this lawsuit we will then proceed in making plans to close West Drive.

INTERROGATORY NO. 3

Has the City of Memphis over the last ten (10) years received from residents of predominantly black areas applications to close streets?

ANSWER TO INTERROGATORY NO. 3

Yes.

INTERROGATORY NO. 4

If the answer to Interrogatory No. 3 is in the affirmative please provide the following; (a) the date of such application, (b) the location covered by such application, (c) the names and addresses of the applicants, (d) the reasons for the desired closing, and (e) the action if any taken on such applications.

ANSWER TO INTERROGATORY NO. 4

1. a. March 19, 1968.

   b. Closure of Autumn Avenue and alley from 2-A, L & N Railroad to 3-A, 125' East toward Scott Street; 3-B Scott Street.

   c. J.S. Ostby, Jr., 2795 Broad Street.

d. Street desired to be closed due to having never been used by anyone but applicant. Applicant desired that alley be closed because it allegedly bordered the applicant's property.

e. Planning Commission recommended conditional approval of closure. Conditions attached included ten-foot easement in Autumn Avenue centered on the sanitary sewer line.

2. a. June 28, 1971.

b. Louisa Street from 114.75 feet north of Saxon Street to south line of LeMoyne-Owen College property 304.75 feet south of south line of Walker Avenue.

c. LeMoyne-Owen College, 807 Walker Avenue.

d. Applicant desires to use property in connection with construction of new building. The building will cover part of the street in question.

e. Closure approved per resolution of City Council August 17, 1971.

3. a. 1968.

b. Benton Street from Woodland to Alice.

c. Supreme Mortgage and Realty Co., Inc., 588 Vance.

d. To meet setback requirements to the Mosby Woodland subdivision and to build single houses on property now occupied by unopened section of Benton Street.

e. December 19, 1968 closure approved by Planning Commission—dropped from City Council agenda November 4, 1969.

4. a. November 27, 1972.

   b. Portion of an alley 163 feet east of Cummings Street from south line of McLemore Avenue to 150 feet south to a point.

   c. Rev. Kneeland, 1251 Effie Road.

   d. Expansion of church building.

   e. Closed per resolution of Council dated July 3, 1973.

5. a. 1974.

   b. Humphrey's Place from south line of Vance Avenue 329′ east of east line of South Lauderdale Street to north line of Bowdrie Place.

   c. Vance Avenue Church of Christ, 585 Vance Avenue.

   d. Church desires to improve lot east of church structure and the subject portion of present alley as off-street parking facility.

   e. The Planning Commission on July 3, 1974 recommended that the closure be approved subject to certain conditions.

6. a. October 20, 1972.

   b. Ruth Street southside of Effie southwardly to north side of Mallory.

   c. Rev. H. O. Kneeland, Jr., 1251 Effie Road.

   d. Ruth has been closed from Elliston south to north line of Effie and there is no need for the street to be cut through from Effie to Mallory.

   e. Closed per resolution of City Council January 30, 1973.

The above information was obtained from the Street and Alley Closing files of the Memphis and Shelby County Planning Commission.

INTERROGATORY NO. 5

What laws, procedures, regulations, or ordinances govern the authority of the City of Memphis to require landowners to construct sidewalks, curbs, and gutters along their property?

ANSWER TO INTERROGATORY NO. 5

Defendants decline to answer this question on the grounds that any answer would constitute a legal conclusion on their part.

INTERROGATORY NO. 6

Does such law require the construction of such sidewalks, curbs, and gutters on that section of the City of Memphis in Hein Park known as West Drive?

ANSWER TO INTERROGATORY NO. 6

Defendants decline to answer this question on the grounds that any answer would constitute a legal conclusion on their part.

INTERROGATORY NO. 7

Does West Drive or any portion thereof have sidewalks?

ANSWER TO INTERROGATORY NO. 7

No.

INTERROGATORY NO. 8

If the answer to Interrogatory No. 7 is in the negative, why hasn't such construction of curbs, gutters, and sidewalks been compelled along West Drive?

ANSWER TO INTERROGATORY NO. 8

The City has not compelled the construction of sidewalks along West Drive due to the provisions of 36-104(a) and (c) of the Memphis City Code. The City of Memphis does not require residents along any existing street to construct curbs and gutters. Any such improvement would have to be part of the City's Capital Improvement Budget.

INTERROGATORY NO. 9

Has the City of Memphis or any of its agencies, over the last ten (10) years exercised any of its authority to compel landowners to construct sidewalks, curbs, and/or gutters?

ANSWER TO INTERROGATORY NO. 9

Yes.

INTERROGATORY NO. 10

If the answer to Interrogatory No. 9 is in the affirmative please provide the following; (a) the location covered by such action, (b) the date of such action, (c) the racial makeup, i.e. predominantly white, predominantly black, or other.

ANSWER TO INTERROGATORY NO. 10

While the City of Memphis Sidewalk Department does keep files on each street within the City of Memphis as to sidewalks which exist on them, there are no records cataloging which streets have been compelled to construct

sidewalks or when they were built. The only way such information can be gathered is to look through each individual street file to see if such sidewalk was compelled by the City and on what date it was built. The number of files one would have to inspect would number in the thousands.

If you or a member of your staff would care to inspect any or all of our sidewalk files we would be happy to make them available for your inspection.

Further, the particular files do not indicate the racial makeup of the neighborhoods. A list of streets where the City has recently ordered the construction of sidewalks during the past year has been compiled by Ed Cook of the Sidewalk Department strictly from his memory. We hope this list will be of some help to you. The streets involved are:

Richwood, Chiswood, Oak Meadows, Winston, Gregory, Riney, Lynchburg, Tessland, Kerwin, St. Elmo, Parkrose, Westmont, Hodge, [Levi], Millbranch, Gill, Floyd, Creston, Carrolton, Voltaire, Hester, Lexie, Bonnie, Favell, Delano, Whitney, Knox, St. Charles

INTERROGATORY NO. 11

Does the City of Memphis have in codified or other form, any procedures governing the requirements that must be met before a City street or any other city roadway or byway can be closed?

ANSWER TO INTERROGATORY NO. 11

All procedures governing the requirements that must be met before a City street can be closed have been provided during the prior depositions of Mr. Robert Miller and Paul Goldstein. (See exhibit attached thereto.)

INTERROGATORY NO. 12

If the answer to Interrogatory No. 11 is in the affirmative please identify such procedures by proper names and indicate whether such will be produced for Plaintiffs absent a Motion to Produce. If same will be produced without such a motion this question may be answered by attaching to your answer a copy of said document.

ANSWER TO INTERROGATORY NO. 12

Not applicable.

INTERROGATORY NO. 13

What is the predominate racial makeup of the Hein Park area in Memphis, particularly that section abutting on West Drive?

ANSWER TO INTERROGATORY NO. 13

White.

The undersigned, being first duly sworn, make oath that the facts stated in the foregoing Answers to Plaintiffs' Interrogatories are true to the best of their knowledge, information and belief.

/s/ Wyeth Chandler
Wyeth Chandler
/s/ Oscar K. Edmonds Jr.
Oscar Edmonds

(Jurat and Certificate of Service Omitted in Printing)

(Filed February 2, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Plaintiff-Intervenors, through their attorney, respectfully move this Court for leave to amend their amended complaint filed on March 29, 1977 in the following particulars:

1. To amend Paragraph I to add the following sentence at the end of said Paragraph.

> The pendent jurisdiction of this Court is also invoked to request this Court to declare that the Defendants in this action did not follow the required State and local procedures in proceeding to close West Drive.

2. To amend Paragraph VIII of Plaintiff-Intervenors' Complaint filed March 29, 1977 to add the following prayer:

> That this Court exercise its pendent jurisdiction herein and grant the relief requested.

The reasons for the leave requested herein are set forth more fully in the memorandum attached hereto.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
Memphis, Tennessee 38103
Attorney for Plaintiff-Intervenors

(Filed February 7, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

(Title Omitted in Printing)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Come now the defendants and in response to the Motion Filed by Plaintiff to Amend their Complaint for the fourth time state the following:

1. Defendants do not object to Plaintiffs amending their complaint for the fourth time so as to add the sentences set forth in paragraphs one and two of their motion.

2. Defendants contend, however, that Plaintiffs' allegation that the defendants did not follow the "required state and local procedures" in proceeding to close West Drive does not state a claim upon which relief can be granted.

3. Defendants are opposed to the suggestion that a hearing be held prior to the trial of this cause.

/s/ Charles V. Holmes
Charles V. Holmes
Assistant City Attorney

/s/ Michael C. Speros
Michael C. Speros
Assistant City Attorney

(Certificate of Service Omitted in Printing)

(Filed February 7, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

SUPPLEMENTAL ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Come now the defendants and in answer to questions propounded by the Plaintiffs in their letters of December 29, 1977 and December 30, 1977 answer as follows:

INTERROGATORY:

Does the Defendant contend that there are in effect at this date laws, procedures, regulations, or ordinances governing the authority of the City of Memphis to require landowners to construct sidewalks, curbs, and gutters along their property?

ANSWER TO INTERROGATORY:

There are ordinances in effect which govern the City of Memphis' ability to require landowners to construct sidewalks. However, there are no such laws, procedures, regulations or ordinances in effect governing the authority of the City of Memphis to require landowners to construct curbs and gutters along existing streets and subdivisions. There is however an ordinance section which sets out requirements of what subdividers must provide in new subdivisions which deals with curb, gutters, and sidewalks.

INTERROGATORY:

Please identify those laws, procedures, regulations, or ordinances which the defendant contends govern the Defendants' authority to require landowners to construct sidewalks, curbs, and gutters along their property, or in lieu thereof attach copies of said procedures.

ANSWER TO INTERROGATORY:

The ordinance sections in effect which govern the City of Memphis' ability to require landowners to construct sidewalks include sections 36-96 through 36-158 of the Memphis City Code.

The section which deals with new proposed subdivisions is section 38-61 of the Memphis City Code.

INTERROGATORY:

Do the Defendants contend that the laws, procedures, etc. referred to in Interrogatory No. 5 require the construction of sidewalks, curbs, and gutters on that section of the City of Memphis in Hein Park known as West Drive?

ANSWER TO INTERROGATORY:

NO.

INTERROGATORY:

If the answer to the preceding Interrogatory is in the affirmative, please state why the Defendants have not compelled such construction.

ANSWER TO INTERROGATORY:

NOT APPLICABLE.

INTERROGATORY:

To what extent, if any, does the City rely on Section 36-97.1 of the Memphis City Code in the execution of its laws as far as sidewalk installation is concerned?

ANSWER TO INTERROGATORY:

If there are no sidewalks on a block of a street or if less than 25% of the residents have sidewalks, any request made that the street have sidewalks must go before the sidewalks Board to determine if sidewalks are necessary.

If however 25% of the residents on the block already have sidewalks, it is not necessary to bring the matter before the sidewalks Board when a request is made. Notices are sent to such property owners immediately upon a request for the remainder of the walks to be laid.

The undersigned, being first duly sworn, make oath that the facts stated in the foregoing Answers to Plaintiffs' Interrogatories are true to the best of their knowledge, information and belief.

Mayor Wyeth Chandler
Oscar Edmonds

(Jurat Omitted in Printing)

(Filed February 9, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. C-74-208

N. T. GREENE, et al.,
Plaintiffs,

vs.

CITY OF MEMPHIS, A Municipal Corporation, et al.,
Defendants.

PRE-TRIAL ORDER

Pre-trial conference before the Honorable Robert M. McRae, Jr., United States District Judge, on February 3, 1978.

Appearances for plaintiffs:

Mr. N. T. Greene, pro se,
1074 Terry Circle
Memphis, Tennessee 38107

Mr. A. C. Wharton, Jr.
Legal Services Association
325 Dermon Building
Memphis, Tennessee 38103

Appearances for defendants:

Mr. Charles V. Holmes
Mr. Michael C. Speros
City Hall #314
125 North Main Street
Memphis, Tennessee 38103

1. *Jurisdiction*

Jurisdiction of the street closing issue in this case was found to be present by the United States Court of Appeals for the Sixth Circuit in its opinion reported as *Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976). The Court held that Greene had stated a 42 U.S.C. § 1983 claim against all defendants except the City of Memphis and its Council. Therefore, as to that claim, subject matter jurisdiction exists under 28 U.S.C. 1343 (3).

In addition, the Court of Appeals found that Greene had stated a 42 U.S.C. § 1982 claim against all defendants, thus providing subject matter jurisdiction of that claim pursuant to 28 U.S.C. 1343 (4).

Although the Court has allowed plaintiffs to amend the Complaint with the issue pertaining to sidewalks, curbs, and gutters, the defendants contend that no jurisdiction exists as to this issue.

2. *Plaintiffs' Contentions*

In general, plaintiffs contend that they are:

(a) A class composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.

(b) That on July 9, 1973, application was made by residents of the Hein Park Civic Association for closing a portion of West Drive.

(c) That the general area known as Hein Park in the City of Memphis, Tennessee, has been a white, well-to-do area, and that the white residents of said area with the support and acquiescence of defendant City officials and their predecessors in office have sought to preserve

the all white nature of said area free from all incursions into said area by black residents.

(d) The proposed dead-ending of West Drive by the defendant City is an unconstitutional violation of the rights of plaintiff-intervenors and the rights of those they represent under the Thirteenth and Fourteenth Amendments and under Sections 1982 and 1983 of the Civil Rights Act of 1866 and 1870, respectively.

(e) That the City of Memphis did not follow established procedural guidelines governing street closings, in that it did not provide a public forum where the "closing" could be discussed; and did not require that the "Application" contain the signatures of "all abutting property owners" to the area to be closed, as was required when the closing proceeding was commenced.

(f) That the closing of West Drive will bestow a benefit on the residents thereof in the nature of increased property values, solitude, and a better environmental quality in general, whereas said closing will be financially and psychologically detrimental to those discriminated against.

(g) That such closing would adversely affect the efforts of plaintiff-intervenors, those they represent, and others who have sought to perpetuate community involvement between the races.

(h) Plaintiffs and plaintiff-intervenors claim that the Court should:

(1) Grant plaintiff-intervenors and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them, from maintaining discriminatory policies and practices against plaintiffs and the class they represent by the closing of West Drive.

(2) Grant plaintiff-intervenors and the class they represent a declaratory judgment that the acts, policies, and practices of defendants complained of herein violate the Thirteenth and Fourteenth Amendments to the United States Constitution and the provisions of 42 U.S.C. §§ 1982 and 1983.

(3) Grant plaintiff-intervenors and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees, and those acting in concert with them from denying the plaintiffs the rights to inherit, purchase, lease, sell, hold, or convey real and personal property as is enjoyed by white citizens.

(4) Grant plaintiff-intervenors damages against the defendants to compensate for property value decreases.

(5) Grant plaintiff-intervenors judgments against the defendants and each of them jointly and severally, for punitive or exemplary damages.

(6) Award plaintiff-intervenors and the class they represent their costs herein.

(7) Award plaintiff-intervenors and the class they represent such further, additional, and different relief as the Court may deem just and proper.

3. *Defendants' Contentions*

(a) Defendants contend that on July 9, 1973, an application was made by residents of the Hein Park Civic Association for the closing of a portion of West Drive south of Jackson. After consideration by the Planning Commission, the matter came before the members of the City Council who approved a resolution closing a portion of West Drive.

(b) In general, the defendants contend there was no material variance from their established procedure in filing, processing, reviewing, and approving the application submitted to close a portion of West Drive. Further, the defendants contend that even if any variations in procedure may have occurred, without admitting that such did in fact, occur, such was not done with any racial intent, motivation, or purpose.

(c) Defendants contend that in other cases residents of black neighborhoods in the City of Memphis have applied for street or alley closings and that their applications were also processed according to established procedure. The benefits that accrue to those who live next to a closed street have been conferred on "black" streets as well as "white" streets within the City of Memphis.

(d) Defendants preserve their contention, which this Court rejected, namely, that the allegations made by the plaintiffs with respect to the issue of curbs, gutters, and sidewalks along West Drive has been previously determined against them when the United States District Court for the Western District of Tennessee, Western Division, dismissed for lack of jurisdiction these same allegations in *Greene, et al. v. City of Memphis, et al.*, Civil Action No. 74-565. Such ruling has a *res judicata* effect on the case at bar.

(e) Defendants also contend that the amended Complaint with respect to this issue fails to state a claim upon which relief can be granted because of the holding in *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed. 2d 438 (1971) *aff'g.* 419 F.2d 1222 (5th Cir. 1969) (*en banc*).

(f) Defendants contend that the traffic perils that would confront black citizens walking along West Drive would equally confront all other citizens who choose that

route for pedestrian travel. The absence of sidewalks does not discourage usage of the route by one race more than it does any other race.

(g) Defendants further deny that there is any legal requirement that sidewalks, curbs, and gutters be placed on West Drive or that the absence of them is in any way the result of racial motivations.

(h) Defendants contend that the individual plaintiffs neither have in the past, nor will in the future, suffer any compensable damages by virtue of the closing of West Drive or the lack of curbs, gutters, and sidewalks thereon. The principal thrust of the plaintiffs' claim is directed to the injunctive and declaratory relief sought.

4. *The Following Facts are Established by Admissions in the Pleadings or by Stipulation of Counsel*

(a) On January 29, 1934, a resolution was adopted by the Memphis City Council pertaining to a portion of West Drive.

(b) West Drive is made up of white residents.

(c) The purported owners of the two lots abutting the portion of West Drive sought to be closed, signed the application submitted to the Planning Commission.

(d) There are no sidewalks, curbs, or gutters along any portion of West Drive.

(e) The civil action brought by the plaintiff-intervenors through this Complaint for Intervention, as amended may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b) (2).

(f) The monetary damage claims contained in the Complaint as amended are made on behalf of the individual plaintiff-intervenors and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

(g) The defendant City of Memphis is a political subdivision of the State of Tennessee and the Municipal Corporation and the other defendants are duly elected and acting executive and legislative officers, respectively, of the City of Memphis.

5. *Contested Issues of Fact*

(a) Whether the defendants, by closing West Drive, have conferred certain benefits on white residents of West Drive that they have refused to confer on similarly situated black neighborhoods because of their color.

(b) Whether a discriminatory purpose was a motivating factor in the decision of the City Council to close West Drive.

(c) Whether the defendants and their agents complied with the normal procedural sequence in processing the application to close a portion of West Drive. If not, the extent to which they failed to comply.

6. *Contested Questions of Law*

(a) Whether the plaintiffs will be denied equal protection and due process of law as guaranteed by the 14th Amendment of the United States Constitution as the result of the closing of West Drive.

(b) Whether under the decisions of the United States Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed. 2d 434 (1976) and *Village of Arling-*

ton Heights v. Metropolitan Housing Development Corporation, ... U.S. ....., 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977) the action of the defendants indicated that a discriminatory purpose was a motivating factor in their decision to close West Drive.

(c) Whether under the holding of *Palmer v. Thompson,* 403 U.S. 217, 915 S.Ct. 1940, 29 L.Ed. 2d 438 (1971) *aff'g* 419 F.2d 1222 (5th Cir. 1969) (*en banc*), the third Amended Complaint of the plaintiffs with respect to the issue of curbs, gutters, and sidewalks states a claim upon which relief can be granted.

(d) Whether the holding of the United States District Court for the Western District of Tennessee, Western Division in Civil Action No. 74-565 has a *Res Judicata* effect on the issue of curbs, gutters, and sidewalks being provided along West Drive in the case at bar.

(e) Whether under the ordinances, laws, and procedures of the City of Memphis, curbs, gutters, and sidewalks are required to be installed along West Drive.

(f) Whether any Order issued by the Court to the defendant requiring less than all the prayers set out heretofore, will adequately secure the rights of plaintiffs and those they represent under the Thirteenth and Fourteenth Amendments and the provisions of 42 U.S.C. §§ 1982 and 1983.

7. *Exhibits Which Will Possibly Be Received in Evidence by Both Parties Include*:

(a) A copy of the resolution of City Council passed on January 29, 1974, closing a portion of West Drive.

(b) A copy of a letter dated November 2, 1973, addressed to Frierson Graves from Ewing Johnson, re: Clo-

sure of West Drive at Jackson Avenue, File Number 73-27.

(c) A copy of a letter dated October 17, 1973, addressed to Mr. Paul Goldstein from I. R. Lendermon, Jr., re: Closure of West Drive at Jackson, # SAC 73-27.

(d) A copy of a City of Memphis Inter-Office Memorandum dated September 5, 1973, addressed to Paul Goldstein from J. W. Hubbard, along with a copy of attached comments contained in a City of Memphis Inter-Office Memorandum dated August 30, 1973, addressed to W. O. Crumby from J. C. Nutzell.

(e) A copy of a letter dated August 24, 1973, from Paul Goldstein to the attached mailing list. Copy reflects it was received by Maynard Stiles, Director of Sanitation, and contains handwritten notes at bottom from Danny Lemmons.

(f) A copy of a City of Memphis Inter-Office Memorandum dated August 23, 1973, addressed to Paul Goldstein from Danny Lemmons, re: Closure of Section of West Drive, near Jackson.

(g) A copy of a document entitled "Street Closing Recommendation" from South Central Bell, re: Closure of West Drive.

(h) A copy of a document entitled "Street Closing Recommendation" from Memphis Light, Gas & Water, dated 7-26-73, and marked "obsolete."

(i) A copy of a document entitled "Street Closing Recommendation" from the Fire Department dated August 21, 1973.

(j) A copy of a document entitled "Street Closing Recommendation" from Sanitation and marked "obsolete."

(k) A copy of a letter dated July 9, 1973, from Bill C. Weber, addressed to the Memphis and Shelby County Planning Commission with attached copies of:

1. A list of Residents along Blocks No. 87 and 91 of West Drive.
2. A signed application to close West Drive from Twenty-five (25) feet south of Jackson Avenue to Intersection of West Drive with south line of Jackson Avenue of said application, consisting of four pages.
3. A Certificate of Survey by Marvin H. White that gives a legal description of the portion of West Drive to be transferred to the abutting owner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision.
4. A Certificate of Survey by Marvin H. White that gives a legal description of the portion of West Drive to be transferred to the abutting owner of the re-subdivided north part of Lot No. 53 in Hein Park Subdivision.
5. A Table of Contents submitted for West Drive Street Closure.
6. A list of agencies with their designated representative and comments signed by Bill C. Weber.
7. A blueprint copy of a plat of the thoroughfare to be closed scale 1″ = 100′ along with a vicinity map of the area.
8. A blueprint copy of the proposed closure showing details of the barricade.
9. A blueprint copy of a detailed survey of the north 25 feet of West Drive in Hein Park Subdivision

showing the proposed Division of street property to residential lots.

10. Film transparencies of the copies contained in items 7, 8, and 9.

(l) A collective exhibit consisting of a copy of a City of Memphis Inter-Office Memorandum dated November 1, 1972, from Robert A. Fosnaugh to Bob Miller, with attachments thereto that comprise the file on a request for closure of certain streets in the Hein Park area.

(m) A copy of a document entitled "Thoroughfare Closure Procedure."

(n) Certified Copies of transcripts of Council proceedings on days pertaining to West Drive.

(o) Transparencies of vicinity map showing Hein Park Subdivision of surrounding area.

(p) Collective exhibit demonstrating traffic pattern at West Drive intersects with Jackson and North Parkway.

(q) Copy of map illustrating plan for channelization island for West Drive.

(r) Collective exhibits of Planning Commission files concerning applications by black areas to close streets or alleys.

Except as otherwise indicated, the authenticity of received exhibits has been stipulated, but they have been received subject to objection, if any, by the opposing party at the trial, as to their relevancy and materiality. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel as soon as possible prior to trial.

8. *Witnesses*

(a) Plaintiffs' witnesses:

1. Ms. Elnora Priest Cross (Intervenor)
2. Ms. Carolyn Burse (Intervenor)
3. Mr. Edwin Owens (Intervenor)
4. Mr. Harrel C. Moore and/or Mr. Samuel Peace (real estate brokers)
5. Dr. Robert [Feit] (Social Psychologist)
6. Spokesperson for [Vollintine] Evergreen Community Action Association (VECAA)
7. Mr. Robert Miller
8. Mr. Paul Goldstein
9. Answers to plaintiff-intervenors in interrogatories.

(b) Possible witnesses to be called on behalf of defendants include:

1. Robert H. Miller
2. Paul Goldstein
3. Ed Cook
4. Jimmy James
5. Jerry Cook
6. Bill Weber
7. J.S. Ostby, Jr.
8. Odell Horton
9. Rev. H. O. Kneeland, Jr.
10. Danny Lemmons.

(c) In the event that there are other witnesses to be called at the trial, their names and addresses and the general subject matter of their testimony will be reported to opposing counsel as soon as possible and prior to trial. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated prior to trial.

9. *Estimated Length of Trial*

The probable length of the trial of this case is three days.

ENTER: This 9th day of February 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Filed February 27, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF/INTERVENORS' POST TRIAL MEMORANDUM

INTRODUCTION

At the conclusion of arguments in this case on February 14, 1978 the Court invited the parties to file additional briefs outlining and summarizing their respective arguments and providing authorities in support thereof. This memorandum will summarize Plaintiff/Intervenors' contentions and will also provide previously omitted authorities in support of Plaintiff/Intervenors' pendent juris-

diction claims. Particular emphasis is given the Sixth Circuit's May 1976 ruling in that it appears that Defendants are attempting to portray that ruling in a very restrictive manner regarding what circumstances will allow the Plaintiff/Intervenors to prevail.

THE COMPLAINT

Plaintiff/Intevenors' Complaint in its final amended form asserts the following jurisdictional contentions:

1. That the rights of the Plaintiff/Intervenors and the class they represent were infringed in violation of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983 (Civil Rights Act of 1871).

2. That the rights of the Plaintiff/Intervenors and the class they represent were infringed in violation of the Thirteenth Amendment and 42 U.S.C. 1982 (Civil Rights Act of 1866).

3. That the Defendants in moving to close West Drive violated state and local laws governing the closing of public thoroughfares and that this Court, pursuant to its pendent jurisdiction, has the authority to redress such violations.

4. That as a part of Defendants efforts to preserve the all white makeup of West Drive, Defendants have refused to order the installation of sidewalks along West Drive.

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This matter is before this Court on remand from the United States Court of Appeals for the Sixth Circuit, see *Greene et al. v. City of Memphis, et al.*, 535 F2d 976 (6th Cir., 1976). In remanding this case, the Court of Appeals stated:

We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, *Timson v. Wright,* ..... F2d ..... (No. 75-1300, 6th Cir., filed March 23, 1976) (slip opinion at 2), citing *Scheuer, supra,* 416 U.S. at 236, 94 S. Ct. at 1686, 40 L.Ed. 2d at 96, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real propperty," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit on their property. 535 F.2d (1076)

With regard to the 42 U.S.C. 1983 claim now asserted in this action, the Court of Appeals stated;

That Greene failed to specifically allege a section 1983 claim cannot preclude him from recovering on a section 1983 claim, should the allegations show and the proof support such a claim. See, e.g. *Janke Const. Co. v. Vulcan Materials Co.,* 527 F.2d 776-77 (7th Cir., 1976), aff'g 386 F. Supp. 687, 692 n. 3 (W.D. Wis. 1974); *Ailshire v. Darnell,* 508 F.2d 526, 528 (8th Cir., 1974); *Parr v. Great Lakes Express Co.,* 484 F.2d 767, 773 (7th Cir., 1973); *United States v. Martin,* 267 F.2d 764, 771 (10th Cir., 1958); *Dotschay v. National Mut. Ins. Co.,* 246 F.2d 221, 223 (5th Cir. 1957). We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]"

> clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d

Inasmuch as the Complaint in Intervention specifically alleges a 1983 claim, there is no longer any issue as to the viability of such a claim. We, therefore, have a complete jurisdictional framework which would allow for the consideration of the theory suggested by the Court of Appeals or for other theories supportable under the logic used by the Sixth Circuit. More specifically, Plaintiffs are not without hope if, for the sake of argument they could not show that blacks have applied to have the streets closed but have been denied that right on the basis of race, whereas whites have been allowed to close their streets. The Defendants would have the Court rule that only in that instance could Plaintiff prevail. Under the theories enunciated by the Court of Appeals, Plaintiffs also can prevail if they can establish that their property rights as secured by 1982 have been violated by illegal government action in violation of 42 U.S.C. §1983. For example, and this will be treated in detail below, Plaintiffs could allege and will allege that they are holding their property on a less equal basis than whites because the Defendants, in violation of 43 U.S.C. §1983 and the Fourteenth Amendment Due Process Clause illegally permitted the closing of West Drive.

THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983 CLAIMS

Plaintiff/Intervenors have alleged that their rights as protected by the Fourteenth Amendment to the United States Constitution and by the Civil Rights Act of 1871, 42 U.S.C. §1983 have been violated by the Defendants' conduct in closing West Drive and the denial of sidewalks in that section of the City of Memphis surrounding West Drive.[1]

It is well established that 42 U.S.C. 1983 provides protection to all forms of property rights.

> This Court has traced the origin of §1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 162-163, 90 S. Ct. 1598, 1611-1612, 26 L.Ed., 2d 142; *Monroe v. Pape*, 365 U.S. 167, 171, 183-185, 81 S. Ct. 473, 475, 481-483, 5 L. Ed. 2d 492. That Act guaranteed "broad and sweeping . . . protection" to basic civil rights. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S. Ct. 400, 404, 24 L. Ed. 2d 386. Acquisition, enjoyment, and alienation of property were among those rights. *Jones v. Alfred H. Mayer*

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1. *The Fourteenth Amendment. Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983. Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> *Co.*, 392 U.S. 409, 432, 88 S. Ct. 2186, 2199, 20 L. Ed. 2d 1189.
>
> The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. *Monroe, supra.* 365 U.S., at 171, 81 S. Ct., at 475; *Hague, supra,* 307 U. S. at 509-510, 59 S. Ct., at 961-962. "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." [*Shelley*] *v. Kraemer,* 334 U.S. 1, 10, 68 S. Ct. 836, 841, 92 L. Ed. 1161. See also, *Buchanan v. Warley,* 245 U.S. 60, 74-79, 38 S. Ct. 16, 18-20, 62 L. Ed. 149; H. Flack, The Adoption of the Fourteenth Amendment 75-78, 81, 90-97 (1908); J. [tenBroeck], the Antislavery Origins of the Fourteenth Amendment (1951).
>
> *Lynch v. Household Finance,* 405 U.S. 538, 31 L.Ed. 424 (1972)

The testimony in this case has established that Plaintiff-Intervenors stand to suffer greatly in the sense that their properties will be decreased in value if the proposed closing is allowed to take place. Plaintiff/Intervenors have also established that the motivating factor in closing West Drive was the desire of the white residents of Hein Park to keep "undesirables" out of the area. The only common sense meaning for the term "undesirable" as used here is to read it to mean the blacks who live North of the Hein Park area and who regularly traversed that area.

In addition to the rights directly related to property, however, Plaintiff/Intervenors have a right cognizable

under the Fourteenth Amendment that is separate and apart from what happens to their property. A similar right, if not identical, was recently considered by the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*, ... U.S. ....., 50 L. Ed. 2d 450 (1977). The Court stated:

> Clearly M.H.D.C. has met the constitutional requirements and it, therefore, has standing to assert its own rights. Foremost among them is M.H.D.C.'s right to be free of arbitrary or irrational zoning action. At p. 463.

The decision to close the street in this case has all of the effects of the zoning action and, thus, should be restricted by the same governmental protections that emanate from the Fourteenth Amendment and 42 U.S.C. 1983.

a. The Equal Protection Clause

Plaintiff/Intervenors contend that the preferential treatment bestowed upon West Drive by the Defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. At the outset we emphasize that we do not contend there has been a violation of the Equal Protection Clause simply because of disparate impact. Certainly, the disparate impact is of great relevance but it is not on that consideration alone that we rely. In asserting this argument we are guided by the decision of the Supreme Court in *Arlington Heights v. Metro Housing Corp.* ..... U. S. ....., 50 L.Ed. 2d 450 (1977), the Court stated:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purpose. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by

> a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

We submit that there are many considerations that compel this Court to refrain from granting the Defendants herein the usual judicial deference. First of all, the closing of West Drive at its intersection with Jackson Avenue will cause more of a disruption to the black residents to the North of that intersection, both in terms of the actual disruption of traffic patterns, pedestrian traffic, and psychological ramifications. This was established by traffic studies now in the record and by the testimony of the Plaintiffs and their experts. However, we do not rest on this consideration alone. It was established quite clearly that this is the first time in the history of the City of Memphis that residents sought to close a street of the size and traffic density of West Drive for the reasons outlined in their petition. This, in and of itself, represents a marked departure from the ordinary course of business. Defendants feebly attempt to show that similar actions have been taken by audaciously presenting proof to the Court that it has also closed alleys and streets that were never reopened.

This is a comparison that simply will not wash. Defendants own testimony establishes that alleys and streets serve two totally different purposes and it is thus logical to conclude that different standards must be met in closing streets as opposed to closing a street that has never been open or a little used alley.

Also of paramount importance is the fact that the persons who initiated the proceedings to close West Drive made it clear that it was their purpose to keep black people from the North Memphis Area out of West Drive and Hein Park. Testimony to this end was not controverted. Defendants simply suggest that inasmuch as the City Council did not stress this motive, the Defendants cannot be held responsible for the racially discriminatory motives. This is not the law. The Supreme Court has stated:

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley v. Kraemer, supra, Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 32 L. Ed. 2d 627, 637, (1972).

According to *Arlington Heights v. Metro Housing Corp., supra,* the proof adduced by Plaintiffs herein was in the least sufficient enough to shift to the Defendants the burden of establishing that the same decision regarding the closing of West Drive would have resulted even had there been no racial considerations whatsoever. *Supra,* P. 468, fn. #21. Obviously, the Defendants failed in this connection because by their own proof it was established that the request herein was so rare and unthinkable that similar actions had never been taken by the Defendants before. As noted above, the only effort toward meeting their burden of proof was to show that the City had closed

some alleys and streets that were dedicated but never paved or put into use.

There are other factors attendant to the proposed closing of West Drive here that support an inference of discrimination. Foremost is the fact that the Defendants failed to follow their own procedures in processing the application. The only sensible interpretation of the Defendants own written procedures is that all property owners abutting on the thoroughfare to be closed must sign the application. In this case this is more than a technical departure because the one individual who did not sign the application in fact objected to the proceeding throughout. Additionally, since the initiation of the petition, property ownership has changed numerous times and the procedures followed herein if allowed to stand would close West Drive without providing all residents thereof an opportunity to state their position. Also not to be ignored is the fact that one of the senior planners who worked on this application was a patient of the prime mover behind the closing of the street and yet this employee did not disqualify himself from processing this petition.

The arbitrariness and irrationality of the action taken here is patently clear. On one hand Defendants state that the street will remain open to pedestrians but in the next breath explain that it will belong to private parties free from public control except for the emergency vehicle easements. It isn't even clear who will maintain the mongrelized 24 foot strip in the center of the closure barrier.

The scenario presented by the activities surrounding the processing of this application are all but ordinary. The application in and of itself is a rarity. The leniency with which the application was treated both in terms of abutting owners' signatures and the consent of the concerned city departmental heads all established a marked departure

from the ordinary course of business. These factors when joined with the disparate impact on the black community add up to a clear deprivation of the Equal Protection of the law.

(b) *Denial of Due Process*

Plaintiff/Intervenors contend that they were denied their rights to procedural due process in the following particulars:

1. they were given no notice of the proposed closing,

2. they were not provided a meaningful hearing,

3. the processes followed in closing streets are not based on any clear standards, and

4. the procedures followed allow for irrational and arbitrary action by Defendants and their agents.

THE LACK OF NOTICE

Plaintiff/Intervenors and the class they represent received no official notice of the proposed closing of West Drive. Defendant Miller testified quite clearly that notice was not given and that persons affected could possibly hear of the proposed closing from neighbors or through newspapers. It is beyond question that this method of notification does not comply with the due process clause. On this point the Supreme Court has stated:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected or entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 233, 17 L.Ed. 531, 534. See *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841; *Grannis v. Ordean*, 234 U.S. 385, 58

L.Ed. 1363, 34 S. Ct. 779. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187.

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 2d 556, 569, 570, 92 S.Ct. 1983 (1972).

Thus, it is clear that the Plaintiff/Intervenors' right to hold their property on an equal basis with whites was deprived without due process of law. No notice was given and no excuse was given for not providing any notice. This Court should, therefore, hold that in the least situations where persons are to be as seriously affected as the Plaintiff/Intervenors herein some form of official notice is required.

LACK OF HEARING

The procedures followed by the Defendants in processing the West Drive application did not provide Plaintiffs with a hearing as required by the Due Process of Law clause. It appears that most of the actions taken on the application were done for the most part by staff members of the Planning Commission and that when the application reached the City Council it was basically a rubber stamp action. Plaintiffs were not given an opportunity to appear at any of the Planning Commission hearings simply because of the fact that they did not receive a notice of such hearings. It is at these hearings that Plaintiffs could have challenged much of the technical information relied upon for the ultimate recommendation made to the City Council. To say that Plaintiffs were allowed to appear before the City Council in no way satisfies the constitutional requirement that a hearing be provided.

> The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 1369, 34 S. Ct., 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965).
>
> *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 299, 90 S.Ct. 1011 (1970).

LACK OF STANDARDS

Defendants' testimony confirmed that the Defendants have no clear, written or otherwise, specific standards to govern which streets can be closed. To deprive Plaintiff/Intervenors of their rights as was done here without such standards is a clear violation of the due process clause. Instructive on the question of the need for standards in any deprivation of property right is the case of *Kelly v. Metro Board of Education of Nashville*, 293 F. Supp. 485 (1968). That case involved the expulsion of a high school from participation in high school athletics. The expelled school contended that the procedures used to expel it violated the due process clause in that they did not contain clear and explicit standards governing its responsibility with regard to the alleged conduct which brought about its expulsion. The court agreed with the school's contention and in doing so stated:

> There are two separate considerations which lead this court to believe that the school board denied Cameron High School the protection of procedural due process. The first of these is the lack of pre-existing standards and regulations to structure any disciplinary action taken by the Board; . . . The imposition of penalties in the absence of prescribed standards

> of conduct is contrary to our basic sense of justice. . . Without some guiding standards the possibilities of arbitrary action are increased and individual interests are likely to suffer.

While the *Kelly* case dealt with the imposition of a penalty, in the end it still amounted to a deprivation of a protected right and, consequently, is analogous to the situation here. Plaintiff/Intervenors have been deprived of their property rights by a process that is completely without standards and open to arbitrary action. An example of this is the fact that while the Director of Police disagreed with the decision he deferred to the collective judgment of the petitioners which as we can see was very self centered and narrow. This Court should, therefore, not hesitate to declare that the procedures followed by the Defendants in acting on the West Drive application were violative of the Due Process requirement of explicit standards to govern any governmental deprivation of rights.

PLAINTIFF/INTERVENORS' RIGHTS UNDER 42 U.S.C. §1982

The testimony in this case established that if the proposed closing is allowed to take place, Plaintiff/Intervenors and the class they represent will hold their property on a less equal (or decreased value basis) from the way in which whites hold their property. Defendants have sought to downplay this by saying that the only way Plaintiff/Intervenors can prevail in this case is to show that blacks have applied to have streets closed but have not been allowed to do so because of their race. This is a very traditional reading of 42 U.S.C. §1982 and is not truly descriptive of that section's coverage. We contend that 42 U.S.C. §1982 prohibits the traditional form of discrimination as well as the more derivative or subtle forms

as would be visited upon Plaintiffs if West Drive is closed. Similar arguments were made in *Clark v. Universal Builders, Inc.*, 501 F2d 324 (7th Cir., 1974), a case involving alleged exploitation of blacks in the sale of urban real estate. In rejecting the Defendants' contention that the types of discrimination complained of in that case was not covered by §1982 the Court stated:

> Defendants contend that absent a showing of the traditional form of discrimination, namely, that defendants refused to sell to blacks because of their race, or offer to sell the same houses to whites at lower prices or on more favorable terms than they offer to sell to blacks, plaintiffs have not made out a case under §1982 . . . . We do not agree.
>
> At the outset we note that section 1982 is framed in broad yet clear language. It provides that:
>
> > All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to . . . purchase . . . real property.
>
> Facially, therefore, the scope of section 1982 would appear to be rather far reaching; indeed such a reading of the statute is supported by the Supreme Court's interpretation of section 1982 in *Jones v. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189 (1968).
>
> Defendants insist that section 1982 cannot be construed to encompass other than the traditonal type of discrimination, that is, that defendants offered to sell to whites on more favorable terms and prices than to plaintiffs. Keeping in mind the Supreme Court's admonition in *Lane v. Wilson*, 307 U.S. 268, 275, 59 S. Ct. 872, 876, 83 L.Ed. 1281 (1939), that the Constitution and statutes promulgated in its enforcement nullify "sophisticated as well as simple-minded modes of discrimina-

> tion," we reject defendants' notion of adherence to a strict, rigid, and traditional type of discrimination. We need not resort to a labelling exercise in categorizing certain activity as discriminatory and others as not of such character for section 1982 is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination. Indeed, there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation blacks either pay excessive prices or are refused altogether from purchasing housing, while under the latter situation they encounter oppressive terms and exorbitant prices relative to the terms and prices available to white citizens for comparable housing.

The type of discrimination in this case is quite similar to that in Clark. It is not the traditional form of discrimination, yet it is discrimination in the sense that because of the Defendants' actions here, blacks will hold their property at a depressed value as compared to their white neighbors across Jackson Avenue. This subtle form of discrimination we submit is proscribed by Section 1982 and should be enjoined by this Court.

THE COURT'S EQUITABLE JURISDICTION

In closing argument, Counsel for Plaintiff/Intervenors urge this Court to enjoin this closing pursuant to its inherit equity jurisdiction. That this Court possesses such jurisdiction in vindication of federal rights is well established. The case of *United States v. Alabama* is in point. 304 F. 2d 583 (5th Cir., 1962). In that case the Court observed:

> Once Congress has visited jurisdiction of the cause in the district court, such court has, in the

absence of statutory limitations, all of the traditional powers and facilities of a court of equity. *Williamson v. Perry,* 8 HOW, 495, 12 L. Ed. 1170; *Sprague v. Ticonic National Bank,* 1939, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184. Where a federal statute establishes a general right to sue "federal courts may use any available remedy to make good the wrong done". *Bell v. HUD* (1946), 327 U.S. 678.

THIS COURT'S PENDENT JURISDICTION IN THIS CAUSE

Plaintiffs have amended their complaint to allege that this Court has the authority to correct the wrongs alleged here pursuant to its pendent jurisdiction. We contend that the Defendants have violated their own procedures and the law of the State of Tennessee in proceeding to close West Drive as proposed here.

First of all, the Defendants have applied an unrealistically narrow definition to the term "abutting owner" so as not to require the signature of all landowners on the section of the street to be closed. This is contrary to the common definition of "abutting owner" in street closing matters. Instructive on this point is the treatment given this subject in American Jurisprudence, 2d. That treatise contains the following statement:

> The term "abutting owner" when used in relation to highways, ordinarily refer to one whose land actually adjoins the way (*State v. Fuller,* 407 S.W. 2d 215), but the term is sometimes used loosely, without implying more than close proximity. *State v. Fuller, supra;* Cf. *LO-CACA Gathering Co., v. Missouri-Kansas-Texas R. Co.,* 476 S.W. 2d 732 (1972) and *City of Wichita Falls v. Thomas,* 523 S.W. 2d 312 (1975). 39 Am. Jur. 2d 160.

The Supreme Court of the State of Tennessee has made it clear that Courts in this state should inquire into the motives of a municipality for street closures where there has been an allegation of fraud or a manifest abuse of discretion. *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 S.W.2d 168 (1963). Plaintiff/Intervenors have alleged an abuse of discretion which approaches fraud and have adduced proof to substantiate these allegations. The burden now shifts to Defendants to rebut these allegations. Defendants have failed to do so.

CONCLUSION

For all of the foregoing reasons this Court should permanently enjoin the closure of West Drive and order that Defendants comply with their laws governing the required installment of sidewalks and order same installed along West Drive.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
46 North Third Street
316 Dermon Building
Memphis, Tennessee 38103
(901) 526-5132
Attorney for Plaintiff/Intervenors

(Certificate of Service Omitted in Printing)

TESTIMONY OF [HARRELL] C. MOORE

[91] * * * estate business, would you describe West Drive as a dead-end street. More particularly for persons who are traveling north on West Drive. A. To me, with the closure of West Drive at that intersection, for those individuals traveling north on West Drive, it would create what is known in the real estate business as a "cul-de-sac"; a cove more or less.

Q. All right, and of course a cove indicating that it stops? A. That is correct.

Q. All right.

Now, Mr. Moore, in your opinion what would the placement of this cove or cul-de-sac, what effect, if any, will that have on the property values along West Drive; that section that is immediately affected by this closure? A. It would create more or less a Utopia within the city of Memphis. I think most of us have read with interest that individuals who have left the inner city for suburban living have since been coming back into the inter-city in certain choice locations.

The creation of a cul-de-sac in that immediate area would produce a little haven for those individuals who happen to be property owners in that area with [92] providing all of the amenities of a closed neighborhood, as such. I would think that the property values in that neighborhood would be enhanced greatly.

Q. Now, Mr. Moore, what effect, if any, would this proposed closure have on the property values in the Springdale area; just across Jackson there? A. I am intimately familiar with the Springdale area, having been a real estate agent who more or less was instrumental in providing some houses for those in low economic groups in that area.

From an economic standpoint there would not be a lessening of value in those properties in the Springdale

area, but from a psychological standpoint, it would have a tendency to have a demoralizing—

Mr. Holmes: (Interjecting) I object to that answer. He is not qualified as an expert in psychological opinions.

Mr. Wharton: Well, if he would like to strike that whole answer, we don't have a problem with that.

Mr. Holmes: Well, we only object to the psychological evaluation. He has stated that the property values in and of themselves would not go down.

* * *

[95] The Court: Right.

Mr. Wharton: From his real estate background.

Q. (By Mr. Wharton) Would you please continue with your response, Mr. Moore? A. In my opinion, with the 17 years experience in the real estate industry, psychologically it would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future.

Mr. Wharton: No further questions.

Mr. Holmes: I have no questions.

The Court: All right.

Thank you, Mr. Moore.

[96] (Witness excused.)

Mr. Wharton: We would like to call Dr. Marvin Feit.

TESTIMONY OF MARVIN FEIT

DR. MARVIN FEIT

The said witness, being first duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Wharton:

Q. Would you state your name, please. A. Marvin Feit.

Q. What is your address, Mr. Feit? A. My home address?

Q. Both. A. My home address is 1551 Cordova, Germantown. My work address is the University of Tennessee doing social work, 1246 Union here in Memphis.

Q. You are employed at the University of Tennessee; is that correct? A. Yes.

Q. How long have you been employed there, Dr. Feit? A. A year and a half.

Q. In what capacity are you employed? A. I have been employed as an assistant professor in Planning and Administration, in community organization and also this year I have been a clinical assistant professor in the Department of Psychiatry, University of Tennessee Center of Health Sciences.

Q. And where were you employed before then? [98] A. I was doing consulting work, and also employed at the University of Minnesota.

Q. What is your educational background, Dr. Feit? A. I hold a Ph D. in social work from the University of Pittsburgh, a Master of Science in Public Health from the University of Pittsburgh, a Master of Science from Columbia University in social work and a B.S. degree from Brooklyn College in New York.

Q. Do you have any publications to your credit, Dr. Feit? A. Yes.

Q. Would you list some of those, please? A. Well, I recently just had one published on *American Indian Family Behavior and Implication of Social Work Practice,* health care among the American Indian community. Notes relative to community organization, a workshop done in Minneapolis, Minnesota and work done on reviewing small group work, research relative to social work practice. And presently I have a publication, a book that is coming out, the Management of Administration of Drug and Alcohol Programs. And several other small publications that I have done at workshops and conferences on community organization in Pittsburgh, in Erie, Pennsylvania, in Minneapolis, Minnesota; in New York City.

TESTIMONY OF SARAH TERRY

[140] The Court: Other streets.

Q. (By Mr. Wharton) Other streets in the city of Memphis.

Mr. Wharton: Thank you, Your Honor.

A. The only way that it would pose a unique problem would be that we do not have sidewalks. So that the children and everybody has to walk in the streets.

Q. Were you approached by anyone who asked you to sign this petition? A. Yes.

Q. Did they give you any reason as to why they would like to have you sign their petition? A. That there was excess traffic on the street and it was dangerous for children. It was my understanding that trash was thrown out of windows of cars and stuff like that so it made our street littered.

Q. Based on what was told to you during those encounters, did you gain the impression that there was any

racial consideration? A. At one point someone said to us; the person who was passing the petition, that the traffic on the street was undesirable traffic. And I did not ask what that person meant.

[141] Q. Did they make any reference to the people of North Memphis? A. Just the people coming through Hein Park.

Q. How did they describe them? A. This was just one statement, that the traffic was undesirable traffic. But now, you see I did not ask a question to pursue that.

Q. Did anyone from the Planning Commission or anywhere come back and ask you if you wanted to join any petition after it reached the Planning Commission office? Did anyone from that office ask you if you wanted to sign the petition? A. No.

Q. Did they send you any type of notice regarding the closing of the street? A. I honestly do not remember. I don't recall any.

Q. One last question. You are here under subpoena; is that correct? A. Yes.

Mr. Wharton: I have no further questions at this time.

The Court: Mr. Holmes?

[142] *Cross Examination*

By Mr. Holmes:

Q. Mrs. Terry, did you attend the City Council meeting on January 29th, 1974? A. Yes, I did.

Q. And at that time what was your reason for being there? A. My reason for being there was that we were opposed to closing the street and we needed to say so.

Q. Did you speak before the City Council on that day? A. Yes, I did.

Q. Weren't you in fact the first speaker to speak in opposition to the closing of West Drive? A. Perhaps I was. I don't remember what order.

Q. And at that time did you identify yourself as Sarah Terry? A. Yes, I did.

Q. That you lived on West Drive? A. Yes.

Q. Who did you buy your house from on West Drive? A. Dr. Ruth Dinkins.

Mr. Holmes: I have no further questions.

Mr. Wharton: Do you have any * * *.

TESTIMONY OF ROBERT MILLER

[148] * * * the city and five respectively from the county composed the Memphis and Shelby County Planning Commission and served without any compensation.

Q. Now, what was your official relationship with the commission? Were they your supervisors or what? A. Yes. We actually worked for them to bring to them all of the pertinent applciations to these hearings. They were charged with considering them and our old staff would bring all of these matters to them for action and the action would be a recommendation to the respective city and county bodies.

Q. Then during your tenure as director, did you receive an application to close certain sections of West Drive? A. Yes.

(Thereupon, Exhibit Number 13 was passed to the witness.)

Q. (By Mr. Wharton) Mr. Miller, I show you this document. Does that document before you now include part of the package that went along with the application to close West Drive; or that you received with that application? A. I'll say yes, this went along with the applciation.

Q. I would ask that you read the top of that there. [149] A. (Reading.) "Procedure for filing street and alley

closing." There are 10 items and item three indicates, "All abutting property owners must indicate their approval by signing the application form. Spaces for this purpose are provided. Additional owners may sign additional application forms which are marked on the sheet." A blank or blanks are provided.

Q. Now, Mr. Miller, let us turn to the application that was submitted regarding West Drive.

Can you identify that document before you as the application submitted to close West Drive? A. Yes. This is our form, the petition that we give to prospective applicants who wish to close streets or alleys.

Q. All right.

I ask you again Mr. Miller, to read this entry here (indicating) that appears on the actual application sheet. A. (Reading.) "All owners abutting the thoroughfare to be closed must sign the application."

Mr. Wharton: Now, this is Exhibit Number 13, Your Honor.

The Court: All right.

Q. (By Mr. Wharton) Now, Mr. Miller, I will ask you to scan those; I believe it is four pages of [150] signatures there and ask you if you see the name or the names of Mr. Fred Terry or Mrs. Sarah Terry of 732 West Drive.

(Witness scanning document as requested.)

A. You say Sarah Terry?

Q. Yes, sir. A. I don't believe so of anybody that signed in their own handwriting. To the best of my ability, I don't see anything that looks like the name Sarah Terry.

Q. Now, Mr. Miller, during the processing of this application did you receive any information that a Mr. Fred Terry and/or Mrs. Sarah Terry objected to the closing of West Drive? A. Yes. I recall that a Mr. and Mrs. or one of the Terrys wrote us a letter saying

that they owned property on that street that they recently acquired and they wanted us to acknowledge that they were not a party to the application.

Q. I would like to show you Exhibit Number 19.

(Thereupon, Exhibit 19 was passed to the witness.)

Do you recall having reviewed that document before? A. Yes.

[151] Q. And is that the letter that your office received from Mrs. Terry? A. Yes. Mr. Goldstein was on that staff.

Q. Now, what action, if any, did you take in response to this letter, Mr. Miller? A. As you pointed out and as we just discussed, the requirements for an application addresses itself to the abutting property owners. They must sign the application.

I interpret abutting to be immediately adjacent to the land that we are going to close. The portion of the street that we are going to close.

In the case of this application we were entertaining the closure of the south—a distance of approximately 25 feet south of Jackson Avenue, which would require, according to our rules; which would require the abutting property owners to sign the application. In this instance, in this case it required the two corner properties; the southwest corner of West Drive and Jackson and the southeast corner of West Drive and Jackson. The other names on the application are just names on the application. It is not a requirement because we are not closing West Drive for its entire length or anything of that nature. We are closing 25 feet and we require those people who [152] own and abut that 25 feet.

Now, when Mrs. Terry wrote us and said that she doesn't want to be a party as she says in this letter to Mr. Goldstein. Had she been the abutting property owner at the corner and said I want to withdraw and not be

a party to the closure abutting my property, then I would have had to take action to do something with that application. She owns property down the street. We are not closing West Drive down the street. We are closing it at the intersection. We appreciated her letter and I think we acknowledged it but she was not a party to the case at hand. We were not closing West Drive in front of her property. We were closing West Drive up near Jackson. So, it did not affect the application as far as I could determine.

Q. And pursuant to that interpretation, Mr. Miller, the owners of lots 53 and 77, as shown on Exhibit 18, could have—let me go back in case you have forgotten the first part of my question.

To your interpretation of your procedures, the owner of lots 53 and 77 could alone have closed West Drive? A. Absolutely, that is correct. The other names on the petition are just names that we don't require. Maybe it was just part of the situation that the [153] applicant wanted to get these people, maybe the majority to agree or to disagree.

The only requirement in any street or alley closing that we have to follow are the requirements that the abutting property owners, abutting the thoroughfare to be closed, they must sign the application.

Q. All right.

Mr. Miller, in your experience as planning director you have closed other streets; is that correct? A. Oh, yes. We have closed many streets and alleys in Memphis and Shelby County.

Q. How long have you been in this planning business in some capacity? A. More years than I would like to tell you but I would say for 20 years.

Q. Now, during that 20 years, what is the largest number of abutting property owners pursuant to your

interpretation. Just an approximate number that you had in signing an applciation. A. Well, we get both street and alley closings. I think we get more if you want to close an alley, if people want to get an alley closed and of course they would like to fence it so they petition to close an * * *.

* * *

[200] Number two is "dimensions of the thoroughfare".

Number three, "dimensions of the property abutting the thoroughfare".

Number four, "ownership of the abutting property".

Number five, "ownership lines in an area 300 feet to either side of the thoroughfare. Names of owners beyond those abutting thoroughfares need not be shown".

Q. All right, and in connection with that, sir, did you receive—I think you have already got 13 up there, haven't you? A. Yes.

Q. Which is the application. And does it have the maps attached to the back of it?

(Witness reviewing Exhibit 13.)

A. The maps are on Exhibit 18.

Q. No. They are maps that go on Exhibit 13.

Mr. Wharton: I don't have any maps.

Mr. Speros: This is also part of 13. It is submitted with the application.

(Thereupon, the above-described map was passed to the witness.)

Q. (By Mr. Speros) Would you open that up, please, sir, and look at the plat, which is one inch equals 100 [201] feet.

Am I correct, sir, that it shows as abutting owners, the names only of the people who own lots 53 and 77? A. Yes, it has their names.

Q. And the other lots down the extension of West Drive are only indicated by lot number; is that correct? A. Yes.

Q. And that is in compliance with your thoroughfare closing procedure; isn't it? A. Yes, sir.

Q. Thank you.

On page two of the thoroughfare closure procedures. Do you have that document in front of you. It is Exhibit 15. A. Yes.

Q. Would you read, not the last paragraph but the two immediately above that, sir? A. (Reading.)

"An application for a street and alley closing is in effect a request to acquire city-owned property. Therefore, the street or alley should be appraised for its fair value with the * * *.

* * *

[204] * * * have a staff member. Perhaps myself or somebody else on the staff, present at the City Council hearing on the Tuesday afternoon meetings. When this matter is called we will talk about the location, what is the specific request, who will give the Planning Commission recommendation, and the reasons for that recommendation.

And then we sit down and the chairman of the council will hear from the applicants. If there is opposition, he will hear from the opposition. They could question the applicant, question the opposition, question the staff. And ultimately they will vote on the matter.

Q. All right.

So, even if perhaps the staff had recommended against a particular closure, once the Planning Commission takes action, you then before the council represent the Planning Commission's position. Is that correct? A. That is correct.

Q. All right, sir.

What was the motive of the Planning Commission in recommending the closure of West Drive? A. Well, it was really not a motive. It was to go ahead and process the application. The rationale for the favorable recommendation was as we indicated [205] earlier, that we had to weigh between the people along West Drive wanting to have a tranquil mid-town subdivision; and trying to cut off some of the traffic. But having it tranquil as a single-family neighborhood as weighed against allowing the through traffic to go down to North Parkway and then negotiate a turn east or west. Bear in mind that West Drive terminates at the Parkway. It doesn't go any further south. The park is in the way. You cannot get into the park at West Drive and Parkway.

So, if you close it at Jackson, then you would be telling motorists instead of going east and west down at Parkway, you may travel east and west on Jackson Avenue. And by closing the intersection there, there is ample access into the subdivision by those other streets, which I am sure you are all familiar with. Cypress Drive, Charles Drive. A little further to the east is Trezevant, which becomes East Parkway and then turns into Airways and you can go all of the way down to Mississippi by just going a block or two east.

Likewise, if you went to the west you can get over to McLean. McLean is a major north-south street. It takes you into the Overton Park entrance. It takes you down into Lamar and all points south and to the * * *.

CLOSING ARGUMENTS AND COMMENTS OF COURT

* * *

[321] * * * City is that they only require that the people who are going to receive the benefits sign. That issue only has to be fitted to the fact that this is the first time that the Planning Commission has even ended up using this procedure to cut down the traffic on a street. Now, that regulation and that instruction is not controlling. It is merely a question of getting the matter before the Planning Commission and you have some problems about what kind of notice you were going to give them. But notice apparently was given in this case.

Mr. Speros: Well, I—

The Court: (Interjecting) I understand that most of the street closings that we saw today offer situations where the street hadn't even been opened. Yesterday we talked about standards. I started to think, "Well, you can't close a street before it has been opened", but I think you can. It is whether it has been dedicated. So often these things involve a plat and no more where a subdivider put his street in the wrong place and he has to come along and boy is he mad when he has to pay money they are going to put the street in some place else.

But, this is unprecedented.

[322] Mr. Speros: Well, that is true. It is a unique case. I agree with Your Honor it is a unique case. But, I don't think that makes it necessarily a violation of local law.

The Court: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park

Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars. If we get those two people to agree and lend us their names, we can stop these people to the north.

Mr. Speros: You can make an application.

The Court: Right. You can make an application. And that is what we are faced with here.

Now, the problem is we have got to try to fit it in with what the Court of Appeals says the law is. And I agree with one of the points you are making, that how in the world am I going to compare the only time it has ever happened whether they are [323] doing it for blacks or whites.

Mr. Speros: Well, Your Honor, we can't make cases. I mean we had to go to the files and find out what have we done in black neighborhoods. These were the fact situations that we came up with and the question is did the Council act with racial intent or motivation in this case and are they conferring benefits here that they don't give elsewhere. It is not the same benefit, I agree. But, when blacks have come before the Council and wanted to close their streets for whatever reason they listed on their application, they have been treated the same way. That is what the gut issue in this lawsuit is, whether they are receiving differential treatment or not. Not whether they are going to be inconvenienced or whether it is going to throw extra traffic onto their street or not.

The Court: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking

to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

Mr. Speros: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood [324] to the north.

The Court: Have you been out there?

Mr. Speros: I used to live out there.

The Court: Used to, you don't now?

Mr. Speros: Well, Sir, I lived on Overton Park which is just south of there just—

The Court: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominantly black?

Mr. Speros: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

The Court: I will take judicial notice of the fact that that is one of the areas that—we use the word "predominantly". I am sure that it is not all black. Predominantly is kind of a delicate word. Hein Park is not predominantly white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominantly black, then I have got my doubts about them.

Mr. Speros: Well, Your Honor, I am not—

The Court: (Interjecting) And if they don't see the awkwardness of this to that black community, * * *.

TRIAL EXHIBITS 1 & 2

RESOLUTION

WHEREAS, the owners of the property abutting on the hereinafter described thoroughfare have petitioned the Council of the City of Memphis to officially close same; and

WHEREAS, the owners of the property abutting on the hereinafter described thoroughfare have agreed to pay the City of Memphis a contribution in the amount of $800.00 for the closing of said thoroughfare; and

WHEREAS, said portion of the hereinbelow described thoroughfare, lying and being situated in Memphis, Shelby County, Tennessee, to be closed is more particularly described as follows:

> BEGINNING at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivised north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 feet from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginning.

and

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that a portion of West Drive,

from the east right-of-way line of Jackson Avenue extending 26.1 feet southwestwardly, described hereinabove, be, and the same is, hereby closed for public use, to be improved in accordance with the plans and specifications of engineer Marvin White as submitted in the application and with an easement for fire hydrant use.

BE IT FURTHER RESOLVED that the Mayor of the City of Memphis be, and he is, hereby authorized to execute quitclaim deed to the owners of the property abutting on the above described thoroughfare, specifically reserving for the Memphis Light, Gas and Water Division a permanent easement over and on the above described property.

BE IT FURTHER RESOLVED a minimum of 24 feet clearance with no obstruction other than the rolled curbing as submitted and the normal type of rolled speed breaker on the above described property will be provided by the abutting property owners.

BE IT FURTHER RESOLVED that a performance bond or cash in an amount satisfactory to the Public Works Department of the City of Memphis be given with surety to insure the City of Memphis that the improvements provided for in the application will be constructed.

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the Memphis Abstract Company, the Security Title Company, the Mid-South Title Company, the Memphis Title Company, the County Tax Assessor's Office and the Assessment Review Office.

Printer's Note: Trial Exhibit 2 is same document only reconsidered and adopted Feb. 5, 1974. /s/ P.T.

I hereby certify that the foregoing is a true copy and said document was adopted, approved by the council of

the City of Memphis in regular, special session on the Jan. 29, 1974.

/s/ Pauline B. Temple
Deputy Comptroller Council
Records

TRIAL EXHIBIT 3

RESOLUTION

WHEREAS, it has been brought to the attention of the Council that a resolution passed originally by Council on January 29, 1974, reconsidered and passed again on February 5, 1974 to close a portion of West Drive at Jackson Avenue incorrectly stated the portion to be closed and the property to be deeded to abutting property owners; and

WHEREAS, the Council desires to correct this error in description and to reaffirm its action in closing a portion of West Drive at Jackson Avenue.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that the resolution heretofore approved on February 5, 1974 be amended to correct the legal description of said portion by deleting the legal description contained therein and by substituting the following legal description in order to more particularly describe the thoroughfare to be closed:

> BEGINNING at a point in the southerly right-of-way line of Jackson Avenue at its intersection with the westerly right-of-way line of West Drive; thence southwardly along the westerly right-of-way line of West Drive a distance of 26.1 feet; thence eastwardly, parallel to and 25 feet south of the southerly right-of-

way line of Jackson Avenue a distance of 83 feet more or less to a point in the easterly right-of-way line of West Drive; thence northwardly along the easterly right-of-way line of West Drive a distance of 25 feet more or less to a point of intersection of the easterly right-of-way line of West Drive with the southerly right-of-way line of Jackson Avenue; thence westwardly along an extension of the southerly right-of-way line of Jackson Avenue a distance of 75.84 feet to the point of beginning.

BE IT FURTHER RESOLVED that all other provisions in the said resolution be and they are hereby affirmed.

I hereby certify that the foregoing is a true copy and said document was adopted, approved by the council of the city of Memphis in regular session on Jan. 31, 1978.

/s/ Paul N. Arnett
Comptroller

TRIAL EXHIBIT 4

MEMPHIS AND SHELBY COUNTY
PLANNING COMMISSION

City Hall 125 North Main Street
Memphis, Tennessee 38103 Telephone 534-9626

November 2, 1973

Mr. Frierson Graves
City Attorney
3rd Floor City Hall
Memphis, Tennessee 38103

RE: Closure of West Drive at Jackson Avenue File Number 73-27

Dear Mr. Graves:

The Memphis and Shelby County Planning Commission, at its regular meeting on November 1, 1973, recommended that the above mentioned closure be approved as submitted with the following conditions:

(1) Applicant either pay relocation costs for existing Memphis Light, Gas & Water facilities *or* provide easements for existing and future utilities.

(2) Fire Department will require a minimum of 24 feet of clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker.

This recommendation supercedes [sic] a previous recommendation (October 4, 1973).

I am enclosing a copy of the entire Planning Commission file (correspondence, legal description, application form, survey, etc.) pertaining to this matter. The ap-

plication was submitted by the Hein Park Civic Association, whose principal spokesman has been Dr. Bill Weber (782 West Drive).

Please present this matter to the City Council for their consideration. If you have any questions, please call me at 634-3630.

Sincerely,

/s/ Ewing Johnson
Ewing Johnson
Senior Planner

EJ/cmr

cc: Bill Weber M. D.
Marvin White
Mr. & Mrs. Fred H. Terry
Clay Huddleston
Pauline Temple

TRIAL EXHIBIT 13

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

July 9, 1973

Memphis and Shelby County Planning Commission
125 North Main Street
Memphis, Tennessee 38103

Dear Sirs:

Enclosed is a petition with supporting documents asking for the closure of West Drive at Jackson Avenue. The Hein Park Subdivision lies in the heart of the city bounded by high density traffic arteries, e.g. Trezavant, North Parkway and Jackson Avenue. We, the residents of the Hein Park Subdivision, feel that steps to curtail the use of subdivision streets for through traffic is essential if this area is to be preserved as a midtown residential section. In August 1970, a petition to close several streets in our subdivision was presented to and rejected by the City of Memphis Traffic Engineering Department. In the report of Mr. Robert A Fosnaugh concerning this matter, he advised, "From a practical stand-point giving consideration to the many points raised heretofor, it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets, thereby achieving most of the original objective of the proposal." It is upon that recommendation and advice that this petition is presented.

Attached to this letter is a list of agencies with their designated representative with whom we have discussed our proposal. Their comments concerning this closure may be noted.

We sincerely appreciate your consideration of our petition.

Very truly yours,

/s/ Bill C. Weber
Bill C. Weber, M.D.
Street Project Chairman
782 West Drive
Memphis, Tennessee 38112

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

Table of Contents Submitted For West Drive Street Closure.

1. Signed application - 4 sheets - 6 copies each page.
2. Six copies of plat with vicinity map.
3. Six copies blueprint of proposed closure.
4. Six copies detailed survey of portions to be conveyed to adjoining property owners.
5. Six copies legal description of street and portions to be conveyed to adjoining (two) property owners.
6. Sepia prints of plat, blueprint and detailed survey.
7. Letter of introduction - 6 copies.
8. Application fee of one hundred dollars ($100.00).
9. List of residents Blocks 87 and 91 West Drive - 6 copies.

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

West Drive Residents Blocks No. 87 and 91

Mr. & Mrs. J. K. Gurley	820 West Drive
Mr. & Mrs. Leo Schlesinger	821 West Drive
Mr. Albert Johnson	815 West Drive
Mr. & Mrs. Elred L. Webb	807 West Drive
Mr. & Mrs. E. Paul Jones	799 West Drive
Mr. & Mrs. William E. Sharp, Jr	787 West Drive
Mr. & Mrs. B. A. Birmingham	777 West Drive
Mrs. Rachael M. Baker	767 West Drive
Mrs. J. W. Owen	757 West Drive
Mr. & Mrs. J. Poston Cox	747 West Drive
Mr. Charles T. Everts	737 West Drive
Mr. & Mrs. Richard C. Wells	727 West Drive
Mr. & Mrs. John B. Thomas	717 West Drive
Mr. James S. Doyle	707 West Drive
Mr. & Mrs. Lloyd Stern	697 West Drive
Mr. & Mrs. Henry L. Graham	706 West Drive
Mr. & Mrs. William C. Womack	714 West Drive
Mrs. Melvyn A. Levitch	722 West Drive
Dr. Ruth E. Dinkins	732 West Drive
Mrs. John Fitzgerald	742 West Drive
Mr. & Mrs. Paul Lemm	754 West Drive
Mrs. Mary H. Fulton	764 West Drive
Dr. & Mrs. Roland Carter	774 West Drive
Dr. & Mrs. Bill C. Weber	782 West Drive
Mrs. N. W. Gill	792 West Drive
Mr. & Mrs. Larry Lacy	812 West Drive

Mrs. Fred Terry bought this house on April 18, 1973

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

I (We) hereby request the closing of the following street(s) or alley(s):

West Drive

Beginning at: Twenty-five (25) feet south of Jackson Avenue

Ending at: Intersection of West Drive with south line of Jackson Avenue

Reason for request: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce traffic pollution" in a residential area, e.g. noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

Name of Applicant: Hein Park Civic Association, Bill C. Weber, M.D.

Address: 782 West Drive | ZIP: 38112 | PHONE: 452-0310

NOTE:

THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR ARRANGING ITS INTERESTS IN STREETS OR ALLEYS.

Sheet 1 of 4

DATE July 9, 1973

Bill C. Weber

SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. [illegible]	54	87	10[illegible] x 193
Wife [illegible]	Subdn. Hein Park		West side of W. D
2. [illegible]	74	91	100 x 150
Wife [illegible]	Subdn. Hein Park		East side of W. D
3. [illegible]	55	87	100 x 155
Wife [illegible]	Subdn. Hein Park		West side of W. D
4. [illegible]	53	87	60 x 218.5
Wife [illegible]	Subdn. Hein Park		West side of W. D
5. [illegible]	77	91	81.8 x 77
Wife [illegible]	Subdn. Hein Park		East side of W. D
[illegible]	75	91	100 x 170
Wife none	Subdn. Hein Park		East side of W. D
7. [illegible]	53	87	73.6 x 250
Wife [illegible]	Subdn. Hein Park		West side of W. D.
8. [illegible]	56	87	98 x 150
Wife [illegible]	Subdn. Hein Park		West side of W. D

CAR 75.77 CITY 10.00

PROCEDURE FOR FILING STREET OR ALLEY CLOSINGS

1. The official street or alley closing must be typewritten with six (6) copies.
2. Applications must be submitted on or before the regularly scheduled closing date.
3. All abutting property owners must indicate their approval by signing the application form. Spaces for this purpose are provided. Additional owners may sign additional application forms which are marked as sheet .... of ..... (Space provided)
4. File six (6) copies of a plat, certified by a registered Civil Engineer of the thoroughfare to be closed. Scale 1" = 100'. The plat must show all dimensions of the street or alley and dimensions at abutting lots. Indicate the names of abutting property owners on the plat.
5. One (1) sepia print of the plat at 1" = 100' scale, and a film positive reduced, if necessary to 8½" x 11".
6. Six (6) copies of a vicinity map including properties within a five hundred (500) foot radius. Only the pages of abutting property owners need be shown.

   Note: The plat and vicinity map may be combined in one drawing.
7. Six (6) copies of a legal description of the entire thoroughfare to be closed.
8. Six (6) copies of legal descriptions of portions to be conveyed to each adjoining owner.
9. Legal descriptions must read to the centerline unless the properties on both sides are under the same ownership.
10. The application fee is $100.00.

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

1. NAME OF THOROUGHFARE(S): West Drive

2. FROM (CROSS): Twenty-five (25) feet south of Jackson Avenue

3. TO (CROSS): Intersection of West Drive with south line of Jackson Avenue

4. REASONS: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce "traffic pollution" in a residential area, e.g. noise, litter, interuption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

5. APPLICANT'S NAME: Hein Park Civic Association, Bill C. Gruber, M.D.

6. ADDRESS: 732 West Drive | ZIP: 38112 | PHONE: 452-6310

NOTE:

THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTERESTS IN STREETS OR ALLEYS

Sheet 2 of 4

DATE July 9, 1973

Bill C. Gruber
SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. Dr. W. Gruber	70	91	93.2 x 74.4
Wife Mrs. Bill C. Gruber	Subdn. Hein Park		E. side of Hein Dr.
2. Mrs. Mary Jane Allen	13	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
3. Ruth McAdoo	69	87	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
4. Klaus Stern	65	87	99 x 155
Wife Gene Stern	Subdn. Hein Park		E. side of Hein Dr.
5. Wm C McNeill	61	91	100 x 150
Wife Kay D. Womack	Subdn. Hein Park		E. side of Hein Dr.
6. Mrs. J. L. Fitzgerald	70	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.
7. Mr. Kirby J. Gates	76	91	103 x 170
Wife See sheet No. 4	Subdn. Hein Park		E. side of Hein Dr.
8. Adele F. Lemen	71	91	100 x 150
Wife [illegible]	Subdn. Hein Park		E. side of Hein Dr.

...ION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6611

...ame of Thoroughfare): West Drive

...ocation: Twenty-five (25) feet south of Jackson Avenue

...Limits: Intersection of West Drive with south line of Jackson Avenue

...Reason: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce traffic pollution in residential area, i.e., noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

...Applicant's Name: Hein Park Civic Association, Bill C. ...ober, M.D.

...Address: 782 West Drive | ZIP 38112 | PHONE 452-6310

NOTE: THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTEREST IN STREETS OR ALLEYS

Sheet ___ of 1

DATE July 9, 1973

Bill G. Weber
SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Owner	Lot No.	Block No.	Frontage & Depth
Ima P. Patel	69	91	100 x 150
Wife None	Subdn. Hein Park		East side of West Dr.
Heather Lowe	63	87	100 x 150
Wife Evelyn M. Lowe	Subdn. Hein Park		West side of West Dr.
Lieb M. Lieber	58	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr.
Nelson W. Gillis	76	91	103 x 170
Wife None	Subdn. Hein Park		East side of West Dr.
Foster Lee	60	87	100 x 150
Wife Patricia	Subdn. Hein Park		West side of West Dr.
Mary L. Oliver	59	87	100 x 150
Husband None	Subdn. Hein Park		West side of West Dr.
[illegible]	66	91	135 x 155
Wife [illegible]	Subdn. Hein Park		East side of West Dr.
Ira T. [illegible]	61	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr.

APPLICATION TO CLOSE STREETS OR ALLEYS

Memphis and Shelby County Planning Commission

CITY HALL • 125 NORTH MAIN STREET • MEMPHIS, TENNESSEE 38103 • TELEPHONE 527-6619

1. NAME OF STREET(S): West Drive

2. FROM (POINT A): Twenty-five (25) feet south of Jackson Avenue

3. TO (POINT B): Intersection of West Drive with south line of Jackson Avenue

4. REASONS: (1.) Reduce flow of through traffic using subdivision streets.

(2.) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School. (3.) Reduce "traffic pollution" in a residential area, e.g. noise, litter, interruption of community living.

(ADDITIONAL REASONS MAY BE GIVEN ON A SEPARATE SHEET)

5. APPLICANT'S NAME: Hein Park Civic Association, Bill C. Weber, M.D.

6. ADDRESS: 702 West Drive | ZIP: 38112 | PHONE: 452-6310

NOTE:

"THE CITY OF MEMPHIS RESERVES THE RIGHT TO MAKE A REASONABLE CHARGE FOR RELEASING ITS INTERESTS IN STREETS OR ALLEYS"

Sheet 4 of 4

DATE July 9, 1973

Bill C. Weber

SIGNATURE OF APPLICANT

All owners abutting the thoroughfare to be closed must sign the application.

Legal Owner	Lot No.	Block No.	Frontage & Depth
1. Mrs Pattie Fulton	72	91	100 x 150
Wife, name —	Subdn. Hein Park		East side of West Dr.
2. [illegible]	64	87	100 x 150
Wife None	Subdn. Hein Park		West side of West Dr
3. B A Bermingham	57	87	102 x 150
Wife Lucile S Bermingham	Subdn. Hein Park		West side of West Dr
4. Ruth E Hunters MD	69	91	100 x 150
Wife None	Subdn. Hein Park		East side of West Dr.
5. John B Thomas	63	87	100 x 150
Wife Penelope B Thomas	Subdn. Hein Park		West side of West Dr.
6. [illegible]	73	91	100 x 150
Wife [illegible]	Subdn. Hein Park		East side of West Dr.
			x

Signatures on this sheet (4 of 4) for Lot numbers 63 and 73 represent new owners. Signatures for these Lots on previous pages are from the former owners.

MARVIN W. WHITE
JOSEPH D. HAAS
Consulting Engineers
3294 Poplar Avenue
Memphis, Tennessee 38111
Telephone 901 452-7359

In the Century Building

CERTIFICATE OF SURVEY

This is to certify that I have made a survey of the property involved for transferring the west part of the north 25 feet of West Drive to the re-subdivided north part of Lot No. 53 in Hein Park Subdivision as recorded in the Register's Office of Shelby County, Tennessee. The parcel to be transferred is more particularly described as follows:

BEGINNING at a point in an extension of the south property line of Jackson Avenue where said property line crosses the north end of West Drive, said beginning point being 37.92 feet west of the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, as measured along said extension of the south property line of Jackson Avenue and running thence westwardly along said extension of property line 37.92 feet to the northeast corner of the re-subdivided north part of Lot No. 53; thence southwardly along the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25.0 from and parallel with Jackson Avenue 37.92 feet to a point in West Drive; thence northwardly and parallel with the west property line of West Drive 26.1 feet to the point of beginning as shown on the accompanying plat, dated June 25, 1973.

Marvin W. White
MARVIN W. WHITE
JOSEPH D. HAAS
Consulting Engineers
3294 Poplar Avenue
Memphis, Tennessee 38111
Telephone 901 452-7359

In the Century Building

CERTIFICATE OF SURVEY

This is to certify that I have made a survey of the property involved for transferring the east part of the north end of West Drive to the re-subdivided north part of Lot No. 77 in Hein Park Subdivision as recorded in the Register's Office of Shelby County, Tennessee. The parcel to be transferred is more particularly described as follows:

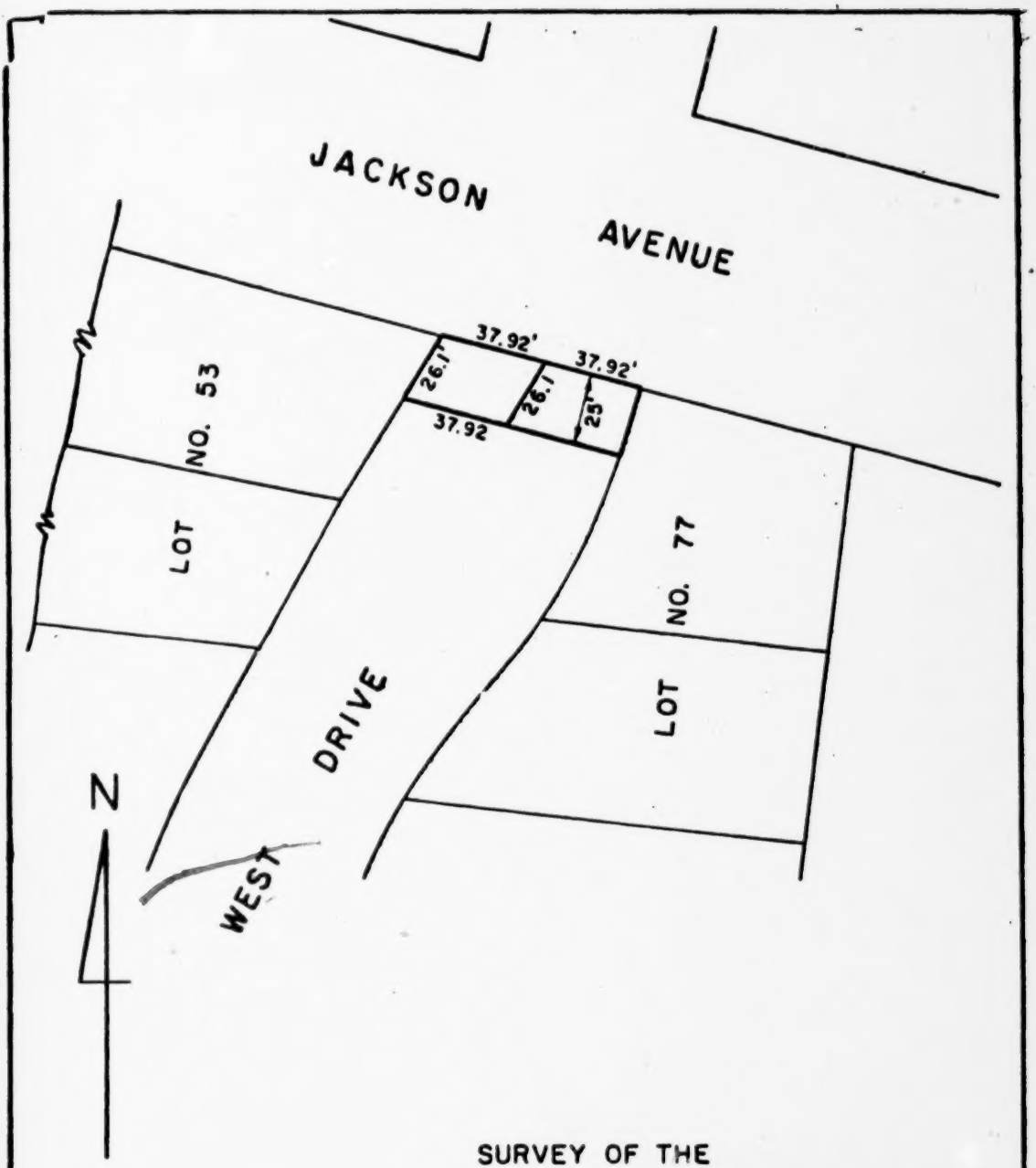
BEGINNING at the northwest corner of the re-subdivided north part of Lot No. 77 in Hein Park Subdivision, said point being at the intersection of the south property line of Jackson Avenue with the east property line of West Drive, and running thence westwardly along an extension of the south property line of Jackson Avenue 37.92 feet to a point; thence southwardly along a line parallel with the west property line of West Drive 26.1 feet to a point; thence eastwardly along a line 25 feet from and parallel with an extension of the south property line of Jackson Avenue, to a point in the east property line of West Drive; thence northwardly along said east property line of West Drive to the point of beginning, as shown on the accompanying plat, dated June 25, 1973.

Marvin W. White

Hein Park Civic Association
Hein Park Subdivision
Memphis, Tennessee 38112

1.	Traffic Engineer Mr. Robert A. Fosnaugh	No objection
2.	City Fire Department Lt. H. D. Crossnine	No objection provided the design of closure will allow the free passage of firefighting equipment. This provision has been provided for in our proposal
3.	Memphis Light, Gas & Water Div. Right of Way Department Mr. Frank W. McBride	No objection
4.	South Central Bell Engineering Department Mr. G. E. Pyron	No objection
5.	City of Memphis Sanitation Dept. Mr. Maynard [Stiles]	No objection
6.	Division of Public Works Mr. Sam Beech	No objection
7.	City of Memphis Police Department Chief Leatherwood	No objection

/s/ Bill C. Weber
Bill C. Weber, M.D.
Street Project Chairman
782 West Drive
Memphis, Tennessee 38112



SURVEY OF THE

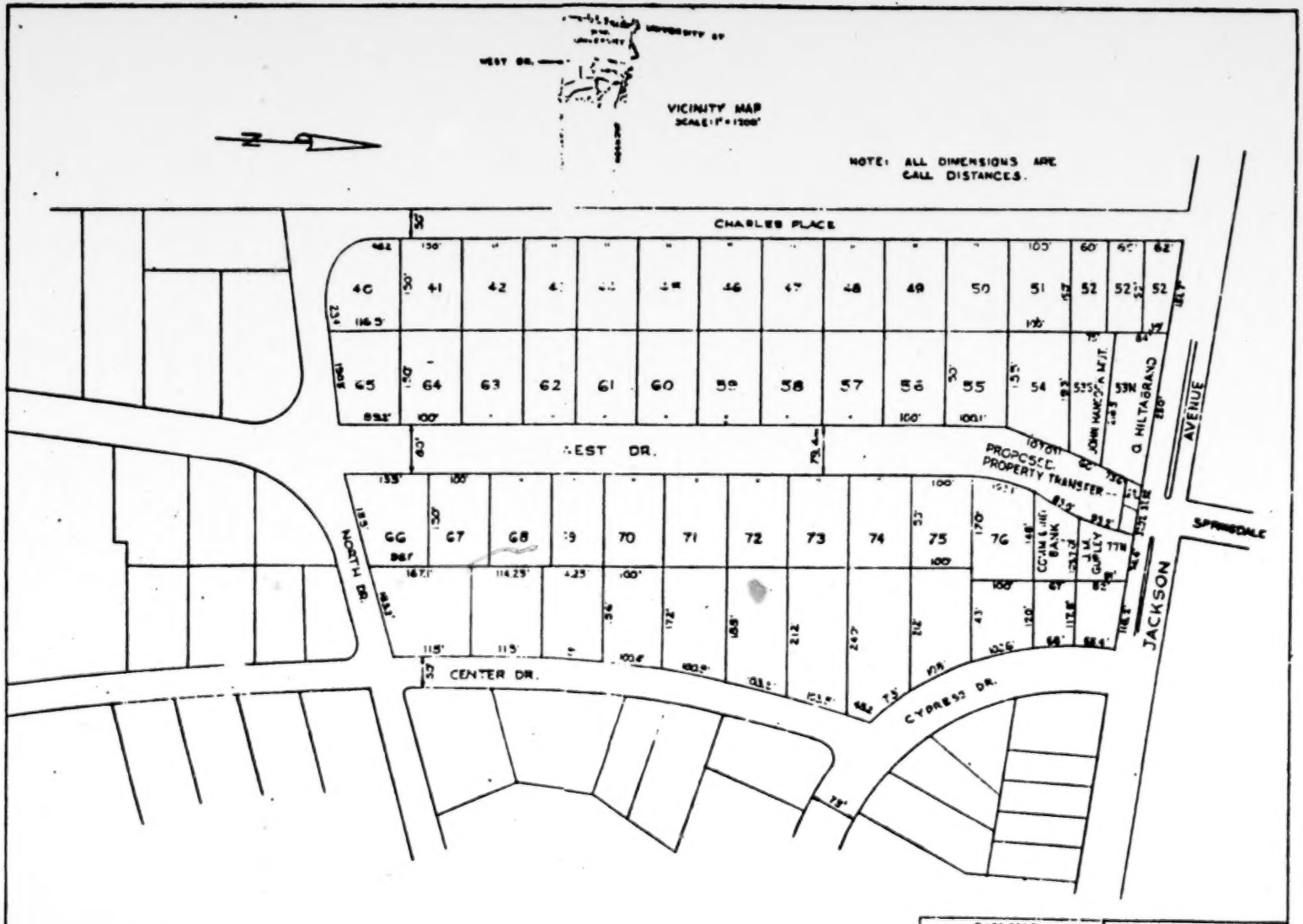
NORTH 25 FEET OF WEST DRIVE
IN HEIN PARK SUBDIVISION

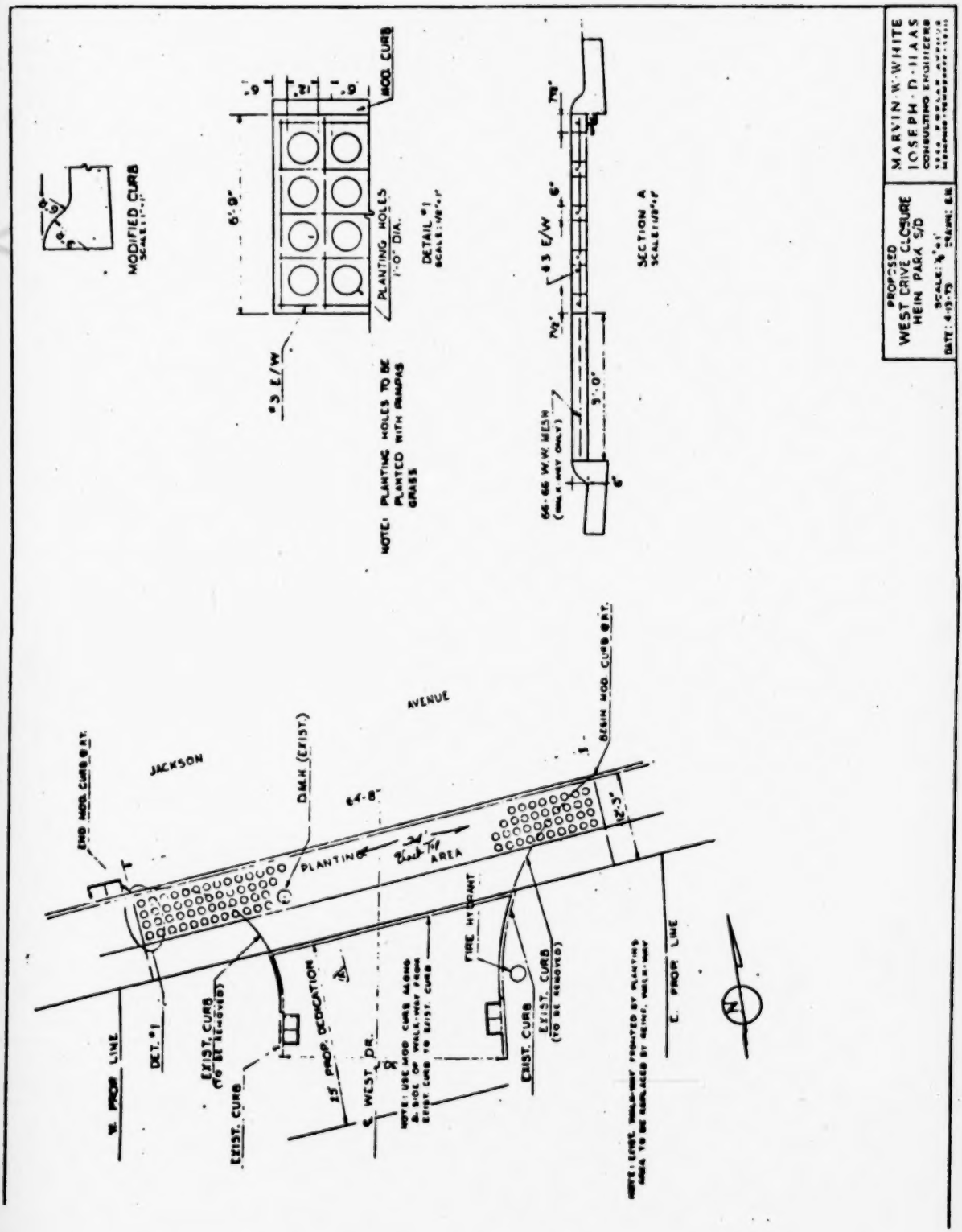
IN SHELBY COUNTY, TENNESSEE

SHOWING PROPOSED DIVISION OF
STREET PROPERTY TO RESIDENTIAL LOTS

SCALE : 1" = 50' JUNE 25, 1973

MARVIN·W·WHITE
JOSEPH·D·HAAS
CONSULTING ENGINEERS
3594 POPLAR AVENUE
MEMPHIS·TENNESSEE·38111


VICINITY MAP
SCALE: 1" = 1200'
NOTE: ALL DIMENSIONS ARE CALL DISTANCES.
CHARLES PLACE
WEST DR.
CENTER DR.
NORTH DR.
CYPRESS DR.
JACKSON AVENUE
SPRINGDALE
PROPOSED PROPERTY TRANSFER
JOHN HANCOCK MUT.
O. HILTABRAND
COMM'L. IND. BANK
J.H. GURLEY TTN
PROPOSED
WEST DRIVE CLOSURE
HEIN PARK S/D
MARVIN·W·WHITE
JOSEPH·D·HAAS
CONSULTING ENGINEERS


PROPOSED
WEST DRIVE CLOSURE
HEIN PARK S/D
MARVIN W. WHITE
JOSEPH D. HAAS
CONSULTING ENGINEERS
MODIFIED CURB
DETAIL #1
NOTE: PLANTING HOLES TO BE PLANTED WITH RINDRAS GRASS
6x6 W.W. MESH
SECTION A
JACKSON AVENUE
END MOD. CURB BY.
DMH (EXIST.)
PLANTING AREA
BEGIN MOD. CURB BY.
EXIST. CURB (TO BE REMOVED)
W. PROP. LINE
E. PROP. LINE
15' PROP. DEDICATION
WEST DR.
FIRE HYDRANT
N

(Filed June 21, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

NO. C-74-208

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, EDWIN OWENS,
CAROLYN BURSE,
Intervenors,

vs.

CITY OF MEMPHIS, A Municipal Corporation, WYETH CHANDLER, as Mayor, THE COUNCIL OF THE CITY OF MEMPHIS, and EDWIN McBRAYER, as Chairman of the Council of the City of Memphis,
Defendants.

MEMORANDUM DECISION

This is a cause of action which was filed to prevent the implementation of the action of the defendants as officials of the municipality, the City of Memphis, Tennessee, from effectively closing a residential street to the public.

The case was dismissed previously by another Judge of this District upon a motion to dismiss for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Sixth Circuit reversed and remanded because it found that the original plaintiff Greene did state claims upon which relief might be granted. *Greene v. City of Memphis*, 535 F.2d 976 (C.A. 6 1976).

In remanding this case, the Court of Appeals stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. Section 1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, reasonably aver that the closing confers certain benefits, *to wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property subject to having the city confer the dead-end street benefit on their property. 535 F.2d 978 . . . . We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "persons[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. 535 F.2d 978, 79.

After the remand the case was transferred to the undersigned Judge of this District and the original attorney for the plaintiffs was allowed to withdraw on his own motion. Considerable delay was encountered before new counsel was obtained. Intervention was allowed by three additional plaintiffs.[1]

---

1. At the trial on remand the only original plaintiff who was still a party was N. T. Greene, who acted *pro se.* A. C. Wharton, Jr. of Memphis Area Legal Services ably represented the intervenors.

Motions to amend the complaint were allowed to allege the failure of the defendants to provide sidewalks on the street in question, the existence of a class action, and pendent jurisdiction of this Court to grant relief because the defendants did not comply with state laws and municipal ordinances and regulations.

A non-jury trial was held and this Memorandum Decision sets forth the findings of facts and conclusions of law of that trial.

Before setting forth the more specific findings of facts, the basic factual information must be stated.

The case pertains to a subdivision in the heart of Memphis, Tennessee, known as Hein Park. It was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large cross-town thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive.

The partial closing will be accomplished by having the northernmost property owners on West Drive buy a

25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

On July 9, 1973, an application was made by members of the Hein Park Civic Association for the closing of a portion of West Drive just south of its intersection with Jackson Avenue in Memphis, Tennessee (Trial Exhibit 13). The application states that the reasons for the requested closure are to: "1. Reduce flow of traffic using subdivision streets, 2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, 3. Reduce 'traffic pollution' in a residential area, e.g. noise, litter, interuption (sic) of community living."

On the printed face of the application it is provided that "All owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the Procedure for Filing Street or Alley Closings and includes this same requirement. It was stipulated by counsel in the pre-trial order that the purported owners of the two lots abutting the 25-foot strip of West Drive sought to be closed, signed the application submitted to the Planning Commission (Pre-Trial Order, page 6).

The Procedures listed on the back of the application also provide that additional owners may sign the application. The application contains the purported signatures of the owners of 26 lots on West Drive in addition to the two lots which are involved in the closing.

Sections 4 and 6 provide that the names of abutting property owners be shown on the plat that must be filed

with the application. An examination of the plat filed with the application reveals that only the names of the owners of lots 53 and 77 along West Drive appear. Other lots along West Drive are denoted on the plat only by number.

The Planning Commission staff received a letter from Mrs. Sara F. Terry, a resident of West Drive, indicating her opposition to the proposed closing of West Drive at Jackson Avenue. Mrs. Terry indicated that she and her husband, Fred, had purchased the property at 732 West Drive and had lived there since April 28, 1973. Mrs. Terry testified at the hearing in this Court that she had been approached to sign the application by someone in the neighborhood and that she was told that the reason the closure was being sought was to eliminate "undersirable traffic." Mrs. Terry did not sign the application. She appeared before the Memphis City Council on January 29, 1974, and spoke in opposition to the resolution closing a portion of West Drive.

The staff of the Planning Commission interprets the phrase "owners abutting the thoroughfare to be closed" in its requirements for application to close streets or alleys to mean only those persons whose property physically touches some part of the street or alley that is to be closed to the public use. The property, once closed, is deeded by quit-claim deeds to these abutting owners.

Upon receipt of the application the Planning Commission staff followed the usual procedure and communicated with various departments of the City Government in an attempt to discern their feelings regarding the closure.

Memphis Light, Gas, and Water Division offered no objection to the closure provided an easement was retained

for existing and future utility services. An examination of the resolution passed by the City Council indicates this condition was satisfied (T.E. 1, 5, 4, and 10).

South Central Bell Telephone System had no objection to the closing (T.E. 9).

The Fire Department indicated it could not approve the closure unless there was the 24-foot clearance with no obstructions other than the rolled curbing as submitted and the normal type of rolled speed breaker (T.E. 11, 4). The resolution passed by the City Council provides for this to be done (T.E. 1).

A memorandum from the Director of the Memphis Police Department to a Planning Assistant of the Planning Commission indicated that police response time would be inhibited, but he believed that "the residents of the [West Drive] area are competent to decide which problem they prefer to live with." (T.E. 6.)

The Sanitation Department sent three separate written communications to the Planning Commission regarding this closure. First they objected to the closure, then they offered no objection provided a turn-around was provided, and finally, they reported having no objection (T.E. 7, 8, 12). Mr. Paul Goldstein of the Planning Commission staff testified that he thought a turn-around was incorporated in the final plan; however, neither the specifications nor the resolution refer to a turn-around (T.E. 1, 13). Presumably, sanitation trucks will be allowed to utilize the same 24-foot clearance that is available to emergency vehicles for passage through the area.

There is no written communication from the Traffic Engineering Department after the time this application was filed in July 1973. The file does contain an earlier set of writings from that department (collective T.E. 14).

Mr. Goldstein explained that departmental work done prior to an application being filed may be part of the pre-application process.

It appears from the Traffic Engineering file that was forwarded to the Planning Commission that the department had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets in the subdivision. The then Traffic Engineer, Mr. Robert Fosnaugh, advised that, "From a practical standpoint . . . it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby achieving most of the original objective of the proposal." (Collective T.E. 14, page 3.) A cover letter that accompanied the application to close West Drive at Jackson Avenue filed on July 9, 1973, indicates that it was upon Mr. Fosnaugh's recommendation and advice that the application to close a portion of West Drive was made (T.E. 13).

The Memphis and Shelby County Planning Commission voted at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved, with conditions relating to the Memphis Light, Gas and Water facilities and the Fire Department that have been previously mentioned. A copy of the letter informing the City Attorney of this action and requesting him to present the matter to the City Council was sent to Mr. and Mrs. Fred H. Terry, the objectors on West Drive (T.E. 4).

The matter came on for hearing before the City Council on January 29, 1974. At the City Council meeting after presentation of the proposal by Mr. Robert Miller, Executive Director of the Planning Commission, four persons spoke in favor of the resolution and seven persons spoke in opposition, including Mrs. Fred. H. Terry and the plaintiff

N. T. Greene. Each side was given 15 minutes to present its views.

Both during and after the speakers' presentations members of the City Council asked questions concerning various aspects of the proposal and debated among themselves the merits and demerits of the proposal. After discussion, a vote was taken on the resolution to close a portion of West Drive with the certain conditions previously mentioned. The resolution passed (T.E. 26, 1).

On February 5, 1974, the City Council reconsidered the closure and again voted to close this portion of West Drive (T.E. 27, 2). The next week the City Council heard four speakers on the question of re-opening West Drive; however, no vote was taken, since the item was not on the agenda other than as a discussion item (T.E. 28).

On February 26, 1974, a resolution regarding the re-opening of West Drive was held over until March 5, 1974 (T.E. 29). On March 5, 1974, a hearing was held on a resolution that sought to re-open West Drive. There were nine speakers in favor of the re-opening, including plaintiff N. T. Greene. Two persons spoke in favor of keeping the street closed. The resolution regarding the re-opening of West Drive was voted on by the City Council and failed to pass (T.E. 30, 31).

When preparations for the hearing of this case were being made, city officials discovered an oversight in the earlier proceedings. Therefore, on January 31, 1978, the City Council passed a resolution correcting the legal description contained in the earlier resolution. Plaintiff, N. T. Greene, and Mr. A. C. Wharton, attorney for the intervening plaintiffs, spoke in opposition to this change. The legal description contained in the 1974 resolution covered only the western half of the proposed closure, which was

to be deeded to the abutting owner of lot 53 north. After amendment, the legal description contained in the resolution matches the area of West Drive that is to be closed according to the plans submitted by the applicant's engineer (T.E. 341, 13).

Plaintiff N. T. Greene testified at the trial in this Court that the closure would compound the multitude of negative experiences that he has encountered as a black person. He complained that the closure would prevent convenient vehicular access to various facilities contained in Overton Park and would cause him, his family and neighbors psychological and emotional damage. His home is located on Terry Circle in Memphis, Tennessee, which is northwest from the intersection of West Drive and Jackson Avenue (T.E. 22). Insofar as his use of West Drive to and from his residence, the closure would cause him no actual inconvenience. He also complained of the fact that there are no sidewalks, curbs, or gutters along any portion of West Drive, a fact stipulated to by counsel (Pre-Trial Order, page 6).

Mrs. Elnora Priest Cross, an intervening plaintiff, testified that she would like to be able to go through West Drive. She has a friend who works at the home of someone who lives on West Drive and contacts her in the event of an emergency.[2] Mrs. Cross lives on Smith Avenue, which is a dead-end street in north Memphis (T.E. 22).

Mr. Edwin Owens, another intervening plaintiff, testified that he does not wish to have West Drive closed, nor does he wish the street that he lives on to be closed. He is presently residing in another area of Memphis known as Frayser (T.E. 22). His chief complaints against the

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2. Mrs. Cross will still be able to reach her friend; however, she will be inconvenienced by having to use a different route.

city government arise from conditions which existed at his previous address on Bellevue. They center around the fact that garbage trucks used to pass down the street emitting noxious odors on the way to the dump. He has also had to step off of buses into mud on some occasions because of a lack of sidewalks. These matters occurred in parts of Memphis other than West Drive. He does not know of a black neighborhood that has applied to have a street closed.

Mr. Harrell Moore, a licensed real estate broker for 17 years, testified that it was a benefit to residents to live on a closed street. He felt that the closing of West Drive would create a "utopian community." However, in his expert opinion there would not be a decrease in value experienced by the property owners located to the north of West Drive because of the closure.

Dr. Marvin Feit, an assistant professor at the University of Tennessee School of Social Work, testified that it was his opinion that closing West Drive would result in negative consequences in the form of hostility towards the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police. He also was of the opinion that the closure would result in more disgruntled drivers.

Mr. Calvin Woods, Jr. indicated that he was opposed to the closure of West Drive because he felt that it would cause the traffic to be shifted over to his street, which is East Drive, north of Jackson.

Mr. Robert Miller, the Executive Director of the Planning Commission staff, testified in this cause that the motive of the Planing Commission staff in recommending the closure of West Drive was to provide the residents of that street with a more tranquil neighborhood. He also testified that in his opinion the southbound traffic

that would be prohibited by the closure would not be greatly inconvenienced by the closure since one block to the east there is a street, Trezevant, that gives straight access all the way to South Memphis and the State of Mississippi, and several blocks to the west there are University and McLean Streets, which are major thoroughfares offering additional access to southbound traffic to the nearby Overton Park and Snowden School and other more remote attractions south and west of Hein Park.

Mr. Paul Goldstein, a Planning Assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closings and making a field study of the area under scrutiny.

He explained that a document entitled "West Drive Street Closure" contained in the file was not an official document of the Planning Commission (T.E. 21). The document states in part on page 2, number 4, "As required on the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are handwritten above the typewritten word "affected" which has been crossed out.

Mr. Goldstein testified that these were the notes of Mr. Jerry Cook, an employee of the Planning Commission who was not a part of the street and alley closing section of the Planning Commission but rather was in the zoning section. He had been asked to attend a meeting concerning West Drive that Mr. Goldstein could not attend and had prepared the notes as a result of that new assignment. He noted in his testimony that the official application does not require the signatures of "affected" owners. It only requires the "abutting" owners to sign (T.E. 13).

Mr. Goldstein's testimony reflects that the City of Memphis has on other occasions received and granted requests from residents of black neighborhoods to have streets or alleys closed. These are summarized below. However, it is noted that none of these involved closing a street for the purpose of stopping through traffic.

On July 3, 1973, six days prior to the application filing date in the West Drive case, the City Council closed a small portion of an alley located between East McLemore Avenue and Stafford Avenue, which is a black neighborhood in Memphis, Tennessee, thereby creating a dead end to the alley. The applicant was the Union Valley Baptist Church, acting through its black pastor. The church owned the property on both sides of the alley that touched the portion of the same that was to be closed, and only a representative of the church signed the application. None of the other owners along the alley, whose access to East McLemore by this route would be terminated, signed the application. The abutting owner agreed to pay $262.00 for a quit claim deed to the property involved. The application submitted states that the reason for the requested closure was to allow expansion of a church building by joining two separate parcels owned by the church into one larger parcel of land.

A similar application was received to close a portion of an alley bordered on both sides by the Vance Avenue Church of Christ. The trustees of the church are the only persons who signed the application. None of the other owners along the alley or across Vance have signed the application. The area is a black neighborhood. The application states that the reason for the closure is that the "Church desires to improve lot to east of church structure and the subject portion of present alley as off-street parking facility." (T.E. 36.) The Planning Commission file

reflects that the Planning Commission approved the closure on July 3, 1974, with certain conditions relating to utility and telephone easements and Fire Department access. What action, if any, was taken by the City Council is not contained in the file.

In June of 1971, LeMoyne-Owen College, a black institution of higher learning in Memphis, applied for the closing of a portion of Louisa Street north of Saxon Avenue. The application reflects that the closure was essential to the completion of a building project and to the best use of the area. The college owned the property on both sides of the requested closure. Mrs. Eva Payne, whose property touched the closure at one corner, also joined in the application by a subsequent letter. The Planning Commission approved the closure in August of 1971 conditioned upon easements being provided or reserved for sanitary sewers and Memphis Light, Gas and Water facilities. On August 17, 1971, the City Council approved the closing by a resolution containing the above conditions (T.E. 33.)

In two cases, one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic (T.E. 34, 37). The applications, made in 1968 and 1972 respectively, contain the signatures of all persons who abut along the portions of street which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are black neighborhoods. The files reflect that the Planning Commission approved both closures. On January 30, 1973, a resolution passed by the City Council approved the closure of Ruth Street and states that the abutting owners have agreed to pay $1,200.00 for the closing. The Benton Street file does not reveal any action taken by the City Council.

CONCLUSIONS OF LAW

As heretofore noted the Court of Appeals in its remand opinion directed that the issues to be considered included whether or not "the closing of West Drive left certain white residents with the privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street." Upon a consideration of the facts established, this Court concludes that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The Court of Appeals remand opinion also stated:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

After the remand opinion of the Court of Appeals in the case, the Supreme Court of the United States has spoken to this topic in the case of *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (Jan. 11, 1977). In doing so the Court explained the significance of "racially disproportionate impact" upon the standard of racial mo-

tivation and intent which is required to prove a constitutional violation.

The Supreme Court opinion stated in part:

> Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . .
>
> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

The opinion also noted that the discriminatory purpose might be shown when a clear pattern of discrimination, unexplainable on grounds other than race, emerges from the effect of the state action even when the legislation appears neutral on its face. When the pattern is not stark (egregious), a court must look to other evidence.

On pages 267 and 268 the opinion sets forth several evidentiary sources for determining the issue of intent: (1) The historical background of the legislative decision,

particularly if it reveals a series of official actions taken for invidious purposes. (2) The specific sequence of events leading up to the challenged decision. (3) Departures from the normal procedural sequence. (4) Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. (5) the legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meeting, or reports. The list is not intended to be exhaustive.

This Court concludes that the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

Furthermore, the Court of Appeals remand opinion noted that the allegations of the complaint in this case in nowise approached the egregiousness of the facts in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (C.A. 5 1971), 461 F.2d 1171 (C.A. 5 1972) (*en banc*). In doing so the Court of Appeals remand opinion also endorsed the caveat that every disparity of services between citizens of a city does not create a right of access to federal courts for redress. 535 F.2d at page 979.

Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267, 68.

As heretofore noted, one of the evidentiary sources to establish discriminatory intent referred to in *Arlington Heights* was departures from the normal procedures.

In this case counsel for the intervening plaintiffs has urged that departures from the standard procedures not only establish discriminatory intent, but also the departure from normal procedures and the normal procedures which were followed did not afford the plaintiffs and the members of their class minimal procedural due process; in that they were given no notice of the hearing, they were not provided a meaningful hearing, and the processes followed in street closing are not based upon clear standards. This Court concludes that there were not significant departures from normal procedures and that there was not a denial of due process based upon lack of notice and a meaningful hearing.

With regard to the lack of clear standards in street closing proceedings, the Court notes that alley and street closings are infrequent and unusual, and each one presents different factors to be taken into consideration by the

city officials. As the Supreme Court noted in *Arlington Heights*, "In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits, absent a showing of arbitrariness or intentionality." In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

In summary this Court concludes that the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority. This includes the relief sought in an amendment to the complaint which sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. There was no proof which would authorize this Court to intervene on a racial disparity basis and this Court is not the proper forum to seek to enforce the ordinances of the City of Memphis pertaining to the installation of curbs, gutters and sidewalks in the absence of a constitutional deprivation in the wording or application of the ordinance.

Another post remand amendment to the complaint asks that this Court exercise pendent jurisdiction in order to require the defendants to correct the wrongs caused by the failure of the defendants to follow their own procedures and the law of Tennessee. In this regard the plaintiffs contend that the defendants used a definition of "abutting

owner" that was too narrow and that the defendants abused their discretion and were guilty of fraud in closing West Drive, which is prohibited under the law of Tennessee as announced in *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater,* 213 Tenn. 1, 372 SW 2d 168 (1963). This Court concludes that the evidence does not support a recovery under these or any other theory under the law of Tennessee.

For the reasons set forth above the Clerk of this Court is directed to enter a Judgment for the defendants.

ENTER: This 21 day of June 1978.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
United States District Court

(Decided November 1, 1979)

N. T. GREENE, Plaintiff-Appellant
(78-1527),

Elnora Priest Cross, Edwin Owens and
Carolyn Burse (78-1528),
Plaintiffs-Intervenors-Appellants,

v.

CITY OF MEMPHIS, Wyeth Chandler, the Council of the
City of Memphis and Edwin McBrayer,
Defendants-Appellees.

Nos. 78-1527, 78-1528.

United States Court of Appeals,
Sixth Circuit.

Argued June 5, 1979.

Decided Nov. 1, 1979.

Action was instituted against city and various of its officials for allegedly unlawfully closing a street. The United States District Court for the Western District of Tennessee, Robert M. McRae, Jr., J., entered judgment in favor of defendants, and appeal was taken. The Court of Appeals, Engel, Circuit Judge, held that closing of street, which in effect erected a physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood and which had a disproportionate adverse impact upon certain blacks with regard to noise, traffic and reduction of property values, rose to a level of

"badge of slavery" and constituted a violation of section of Civil Rights Act governing property rights of citizens.

Reversed and remanded.

Celebrezze, Circuit Judge, filed dissenting opinion.

1. Civil Rights (Key) 11

Constitutional Law (Key) 83(2)

Closing of street, which in effect erected a physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood and which had a disproportionate adverse impact upon certain blacks with regard to noise, traffic and reduction of property values, rose to a level of a "badge of slavery", and constituted a violation of section of Civil Rights Act governing property rights of citizens. U.S.C.A.Const. Amend. 13; 42 U.S.C.A. § 1982.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law (Key) 83(2)

Not every racially discriminatory act constitutes a badge of slavery. U.S.C.A.Const. Amend. 13.

N. T. Greene, pro se.

Alvin O. Chambliss, Jr., National Conference of Black Lawyers, Oxford, Miss., for plaintiffs-appellants.

Michael C. Speros, Charles V. Holmes, Asst. City Attys., for defendants-appellees in both cases.

Clifford D. Pierce, Jr., City Atty., Memphis, Tenn., for defendants-appellees in No. 78-1527.

A. C. Wharton, Jr., Memphis Area Legal Services, Inc., Memphis, Tenn., for plaintiffs-intervenors-appellants.

Before CELEBREZZE, ENGEL and KEITH, Circuit Judges.

ENGEL, Circuit Judge.

This litigation arises out of efforts by the residents of Hein Park, a subdivision located in Memphis, Tennessee, to close West Drive at its northerly end so as to bar all through traffic.[1] As found by the district court, Hein Park

> was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for a large park and zoo; the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.
>
> The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision, which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens. These are

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1. A map of central Memphis is attached hereto as an appendix.

> primarily the persons who will be inconvenienced by the so-called closing of West Drive.

As the map indicates, Springdale Street is, in fact, a northward extension, under another name, of West Drive.

The proposed closing is described by the district court in its opinion:

> The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized.

Although the record is uncertain whether the northernmost property owners who are acquiring the east-west strip across the width of West Drive will, in fact, bar all foot traffic as well, it is clear that the proposed conveyance will leave them with the absolute right to do so if they wish, since the property will be private in all respects except for retained rights-of-way for certain service and emergency vehicles and utility easements.

Plaintiffs, certain black individuals and members of a class of black persons in the City of Memphis who own or stand to inherit property immediately to the north of and adjoining the Hein Park area, have attempted from the beginning to prevent the closing. They principally claim in this lawsuit that the closing of West Drive deliberately creates a barrier between the all-white Hein Park subdivision and the predominantly black residential area to the north, limiting access to and from the latter and impairing their property values. The closing is claimed to be a violation of their rights under the Thirteenth and Fourteenth

Amendments;[2] they seek relief under 42 U.S.C. §§ 1982 and 1983.[3]

In an earlier appeal, our court reversed a judgment of the district court which dismissed the original complaint for failure to state a claim. In so doing, we held that the district court relied too heavily on *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and its ruling that the closings of municipal swimming pools would not violate the Equal Protection Clause of the Fourteenth

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2. U.S.Const. amend. XIII provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S.Const. amend. XIV, in part, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. § 1982 (1976) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Amendment where it was shown that such closings prevented whites and blacks equally from enjoying the pools. *Greene v. City of Memphis,* 535 F.2d 976 (6th Cir. 1976) (*Greene I*). In remanding, we held that the facts alleged in the complaint, construed in the light most favorable to the plaintiffs, stated claims under 42 U.S.C. § 1982 and, even though it had not then been specifically pleaded, under 42 U.S.C. § 1983. In dicta, our court further observed that:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officals conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. [citations omitted]
>
> This view does not conflict with *Palmer, supra,* which noted that "no ease in this Court has held that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it." 403 U.S. at 224, 91 S.Ct. at 1944, 29 L.Ed.2d at 444 (emphasis supplied). [citations omitted]
>
> In *Palmer,* the closings left whites and blacks alike without municipal pools; consequently, there was "no state action affecting blacks differently from whites." 403 U.S. at 225, 91 S.Ct. at 1945, 29 L.Ed.2d at 445. According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.

535 F.2d at 979-80.

Upon remand, amendments to the complaint were filed, certain additional individuals moved and were permitted to intervene as plaintiffs and the court certified this as a class action.[4] Thereafter a bench trial was conducted on the merits before the district judge who on June 21, 1978, entered a judgment in favor of the defendants on all remaining issues. In doing so, the judge obviously deemed himself confined to the rationale expressed in the dicta of our earlier opinion of reversal. Thus, his primary focus was on that proof which showed what action was taken by the City of Memphis on petitions filed from time to time by private citizens, white and black, to close streets and alleys within the city. In this respect the court observed that

> the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents

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4. The class was certified in accordance with a stipulation filed by the parties. That stipulation, in part, provided:

> 1. That the civil action brought by the plaintiff-intervenors through their complaint for intervention, as amended, may be certified as a class action that meets the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2).
>
> 2. That the class is composed of black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision.
>
> 3. That the issues embraced by this class action are to be confined to those in which injunctive or declaratory relief predominate.
>
> 4. That the monetary damage claims contained in the complaint, as amended, are made on behalf of the individual plaintiff-intervenors, and are not to be included as part of the relief sought on behalf of the members of the 23(b)(2) class, but said exclusion is not to preclude the seeking of such relief in other proceedings.

> and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.
>
> * * *
>
> As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbond on return.
>
> However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.
>
> * * *

> Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. [252] at 267, 68 [97 S.Ct. 555, 50 L.Ed.2d 450].

While ruling against the plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

> In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees.

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing Symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars [the agreed price of the 25-foot strip across West Drive]. If we get those two people to agree and lend us their names, we can stop these people to the north.[5]

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5. The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just—

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) black?

MR. SPEROS: I am saying that there was no proof introduced to that effect. Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that that is one of the areas that—we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police."[6] The trial judge additionally relied in his findings

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6. Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most important things that I think will occur is an increase in hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harrassment [sic] on the part of the children in the community that attend Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favortism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and the area, particularly in Hein Park.

Q So that you are not restricted—well let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

(Continued on following page)

upon the testimony of plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area," his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it [the street closing], would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the up-

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Footnote continued—

> Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area?
>
> A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the city of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably bring about an increase in arrests and harrassment [sic] of more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.
>
> * * *
>
> . . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

keep would not be nearly so great and it could have a detrimental effect on the property values in the future.

The foregoing citations from the record can only be reconciled with the court's ultimate decision by concluding that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief. If this was, in fact, the limit of the inquiry, the decision must be upheld, for indeed the record did not show that any black resident had ever sought to close a street primarily for purposes of reducing the traffic and contributing to the tranquility of a given neighborhood. We have considerable sympathy with the trial judge's view of his responsibility on remand since it seems supported at least by the cited dicta of our opinion. We do not conceive, however, that this was ever the full intent of our earlier decision, and it seems equally clear that the plaintiffs themselves never abandoned their effort to seek relief on a broader basis. Plaintiffs' posture in their pleadings and throughout the trial was consistent with the closing argument of their counsel:

> Going back to *1982*, which refers to the rights of blacks to hold their property in the same manner as whites, we feel that the closing of West Drive and the enhancement of the value of the properties along West Drive and the attendant and simultaneous decrease in property values that we think we have established here by the testimony of our witnesses in the black neighborhood does deny them a right protected by Section 1982. If the right is to uphold your property, we think that that right has been deprived. Not necessarily from the comparative standpoint of have black citizens ever

applied for a street to be closed of this size and didn't get it, and then just close off the inquiry there.

Now we understand the parameters of the Sixth Circuit's decision in this, but we would suggest that the interpretations of *1982* refer to the full panacean [sic: panoply] of property rights, not necessarily the transfer of property.

Now, we also ask this Court in reviewing this matter be mindful of the Supreme Court's starting point and its instruction of how a case of this nature should be considered. We think that the key language; and I think this is of supreme importance here, the key language is that the Court has to conduct a sensitive inquiry. It would be our argument and it is our argument that a sensitive inquiry in a matter of this type where we are contending that there was racial motivation, racial impact entails taking in everything that was brought forth here.

The "sensitive inquiry" referred to by counsel for the plaintiffs was taken from language of the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). There the Supreme Court was faced with the question of whether the refusal of the Village of Arlington Heights to authorize the construction of a public housing project within its boundaries in suburban Chicago was racially discriminatory and violated the Fourteenth Amendment. As Mr. Justice Powell observed:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis, supra,* 426 U.S.

> [229] at 242 [96 S.Ct. 2040, 48 L.Ed.2d 597]—may provide an important staring point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins,* 118 U.S. 356 [65 S.Ct. 1064, 30 L.Ed. 220] (1886); *Guinn v. United States,* 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340] (1915); *Lane v. Wilson,* 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281] (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 [81 S.Ct. 125, 5 L.Ed.2d 110] (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

Id. at 266, 97 S.Ct. at 564 (footnotes omitted).[7]

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7. Mr. Justice Powell was referring here to *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), and its holding that the petitioners were illegally imprisoned for failure to comply with a city ordinance where such failure was the result of the city's refusal to consent to the petition of approximately 200 persons of Chinese ancestry to operate a laundry business while the same consent was granted 80 others who were not of Chinese descent. The Court held that this worked an impermissible denial of the equal protection of the laws and hence a violation of the Fourteenth Amendment, even where no express evidence of intent was found. In this regard the Court found the facts themselves sufficient:

> The fact of this discrimination is admitted. No reason for it is shown and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution. *Id.* at 374, 6 S.Ct. at 1073.

In *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), also cited by Mr. Justice Powell, the Supreme Court stuck down a local act of the Alabama legislature which rede-

(Continued on following page)

[1] While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indeed "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]

We readily acknowledge that, as a general proposition street closings are a matter of purely local concern. We also recognize that street closings may, indeed, be a very beneficial way of preserving the residential character of a neighborhood against the growing incursion of traffic from outside sources. Thus we take note of plaintiff's reliance upon *Arlington County Board v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977), and the Court's observation that:

Footnote continued—

fined the boundaries of the City of Tuskegee with the effect of removing from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. As Mr. Justice Frankfurter observed:

> The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections. *Id.* at 341, 81 S.Ct. at 127.

8. Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983. Neither our circuit nor the Supreme Court has decided this question. We note, however, that constitutional rights other than those contained in the Fourteenth Amendment have been protected under Section 1983. *See, e.g., Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (violation of Fifteenth Amendment remedied under R.S. § 1979, the predecessor of Section 1983).

> A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter.

Id. at 7, 98 S.Ct. at 26.

[2] We further recognize that not every racially discriminatory act constitutes a badge of slavery. *See e. g., Civil Rights Cases,* 109 U.S. 3, 24-25, 3 S.Ct. 18, 27 L.Ed. 835 (1883). *Cf. Runyon v. McCrary,* 427 U.S. 160, 211, 96 S.Ct. 2586, 2614, 49 L.Ed.2d 415 (1976) (White, J., dissenting) ("A racially motivated refusal to hire a Negro or a white babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery . . ."). Nonetheless, the Supreme Court "recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burden and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom . . .'" *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441, 88 S.Ct. 2186, 2204, 20 L.Ed.2d 1189 (quoting *Civil Rights Cases, supra,* 109 U.S. at 22, 3 S.Ct. 18).[9]

We are convinced that the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood under

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9. Senator Trumbull, the sponsor of the bill which ultimately became the Civil Rights Act of 1866, stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slave-holding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights.

36 Cong. Globe 474 (1866).

the particular circumstances found by the court here is precisely the type of "badge" which was the target of the Thirteenth Amendment and of Section 1982.[10] The broad reach of Section 1982 was repeatedly emphasized by Mr. Justice Stewart in *Jones, supra,* 392 U.S. at 422-37, 88 S.Ct. 2186. As the Supreme Court later observed in *Sullivan v. Little Hunting Park, Ins.,* 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969), "[a] narrow construction of the language of § 1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act]."

42 U.S.C. § 1982 was enacted under authority of Section 2 of the Thirteenth Amendment.[11] *Jones, supra,* 392 U.S. at 413, 88 S.Ct. 2186. Congress therein determined that the disability of blacks to enjoy property in the same manner as whites was a badge and incident of slavery. *Id.* at 439, 88 S.Ct. 2186.[12]

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10. We also note that Section 1982 is limited in its scope to situations having a racial character. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *George v. Rachel,* 384 U.S. 780, 791, 86 S.Ct. 1783, 1789, 16 L.Ed.2d 925 (1966).

11. 42 U.S.C. § 1982, in its original form, was enacted as part of the Civil Rights Act of 1866. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144, and codified in § 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1982.

12. Mr. Justice Bradley in the *Civil Rights Cases, supra,* 109 U.S. at 20, 3 S.Ct. at 28, stated regarding the Thirteenth Amendment:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that

(Continued on following page)

While the Supreme Court has not often been required to define "badge of slavery" under the Thirteenth Amendment, it is clear that many badges of slavery either were a part of the recent past or remain a part of the present. As Mr. Justice Douglas stated:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane v. Wilson,* 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281]. Negroes have been excluded over and again from juries solely on acount of their race, *e. g., Strauder v. West Virginia,* 100 U.S. 303 [, 25 L.Ed. 664], or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia,* 373 U.S. 61 [83 S.Ct. 1053, 10 L.Ed.2d 195]. They have been made to attend segregated and inferior schools, *e. g., Brown v. Board of Education,* 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873], or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania v. Board of Trusts,* 353 U.S. 230 [77 S.Ct. 806, 1 L.Ed.2d 792]; *Sweatt v. Painter,* 339

Footnote continued—

slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States;

U.S. 629 [70 S.Ct. 848, 94 L.Ed. 1114]. Negroes have been prosecuted for marrying whites, *e. g., Loving v. Virginia,* 388 U.S. 1 [87 S.Ct. 1817, 18 L.Ed.2d 1010]. They have been forced to live in segregated residential districts, *Buchanan v. Warley,* 245 U.S. 60 [38 S.Ct. 16, 62 L.Ed. 149], and residents of white neighborhoods have denied them entrance, *e. g., Shelley v. Kraemer,* 334 U.S. 1 [, 68 S.Ct. 836, 92 L.Ed. 1161]. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson,* 163 U.S. 537 [16 S.Ct. 1138, 41 L.Ed. 256]; public parks, *New Orleans Park Improvement Assn. v. Detiege,* 358 U.S. 54 [79 S.Ct. 99, 3 L.Ed.2d 46]; restaurants, *Lombard v. Louisiana,* 373 U.S. 267 [, 83 S.Ct. 1122, 10 L.Ed.2d 338]; public beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877 [76 S.Ct. 133, 100 L.Ed. 774]; municipal golf courses, *Holmes v. City of Atlanta,* 350 U.S. 879 [76 S.Ct. 141, 100 L.Ed. 776]; amusement parks, *Griffin v. Maryland,* 378 U.S. 130 [84 S.Ct. 1770, 12 L.Ed.2d 754]; buses, *Gayle v. Browder,* 352 U.S. 903 [77 S.Ct. 145, 1 L.Ed.2d 114]; public libraries, *Brown v. Louisiana,* 383 U.S. 131 [86 S.Ct. 719, 15 L.Ed.2d 637]. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton v. Alabama,* 376 U.S. 650 [84 S.Ct. 982, 11 L.Ed.2d 979].

Jones, supra, 392 U.S. at 445-46, 88 S.Ct. at 2206 (concurring opinion).

The closing of West Drive is merely another device leading to the same result. It would be, to blacks and whites alike, exactly what the trial judge said it was: an

unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision. "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Jones, supra,* 392 U.S. at 442-43, 88 S.Ct. at 2205.

Without endeavoring to establish any legal guidelines for the determination of when conduct may amount to a badge of slavery, we find the determinations made by the district court here to be altogether adequate to bring the conduct complained of within that description. The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been

violated and the feedral courts must provide a suitable remedy.[13]

OTHER ISSUES

In addition to their Sections 1982 and 1983 claims, the plaintiffs raised certain pendent state claims. The district court held that "the evidence does not support a recovery under these or any other theory under the law of Tennessee." The appellants have not questioned that decision in this appeal; we therefore have not considered it. The plaintiffs also sought a decree that the defendants should be required to cause sidewalks, curbs and gutters to be installed on West Drive. The district court found no basis for such relief and we agree. We likewise agree with the district court's decision that the plaintiffs failed to prove their claim of a violation of their rights to procedural due process under the Fifth and Fourteenth Amendments.

CONCLUSION

In conclusion we hold that under the unique circumstances shown here, the erection of the barrier at the northerly boundary of West Drive constitutes a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their

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13. We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. *Compare* Note, *Racially Disproportionate Impact of Facially Neutral Practices—What Approach under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267 *with* Comments, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y.U.L.Rev. 1030. Cf. *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 1386, 59 L.Ed.2d 642 (1979) (Powell, J., dissenting) (whether case brought under 42 U.S.C. § 1981 requires proof of racially discriminatory intent or purpose is an open question).

rights under the Thirteenth Amendment and entitling them to a remedy under Section 1982.[14] Accordingly, the judgment of the district court is reversed and the cause remanded for the fashioning of appropriate injunctive relief.

Appendix A to follow.

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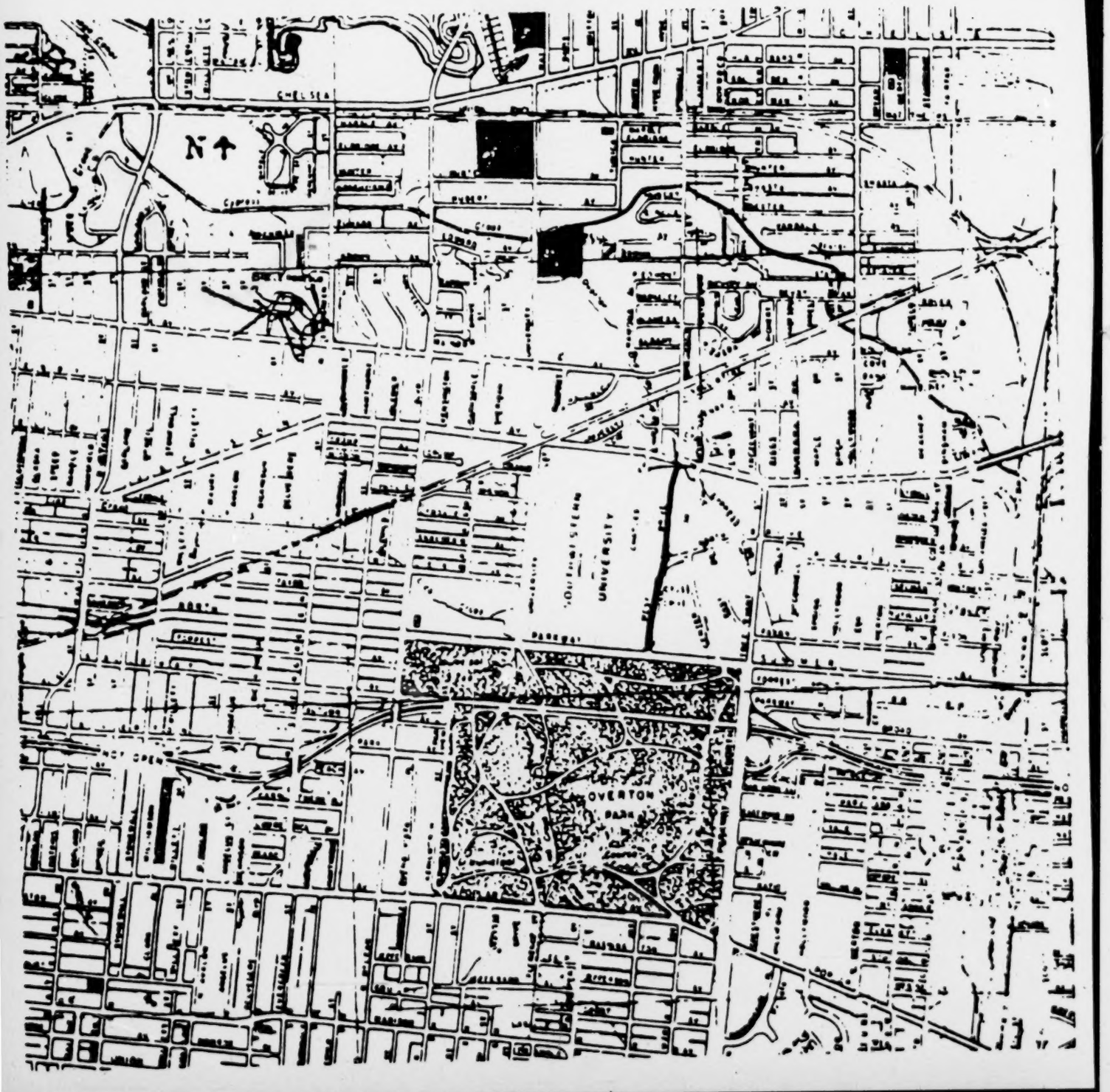
14. "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equtable remedy." *Jones, supra,* 392 U.S. at 414 n. 13, 88 S.Ct. at 2190 n. 13.

APPENDIX A



CELEBREZZE, Circuit Judge, dissenting.

I must respectfully dissent because I am convinced that the majority has erred in several important respects. First, I do not believe that 42 U.S.C. § 1982 is violated by a municipality's exercise of its police powers to close a street when race is not a factor in that decision. The closing of West Drive here does not deprive black citizens of their right to hold property free from racial discrimination in the same manner as white citizens. The majority's extension of § 1982 so as to proscribe the closing of West Drive expands the scope of the statute to an unprecedented extreme and conflicts with the well-established policy of judicial deference to legislative judgment in land use regulation. Indeed, today's decision illustrates the need for a limiting principle for claims arising under § 1982. To this end I would require a showing of discriminatory intent or purpose to establish a violation of § 1982.

Second, the proper focus of this litigation, as recognized by the district court, is whether a racial minority would be denied the equal protection of the laws by the proposed street closing. I believe the district court was correct in finding that the plaintiffs had failed to demonstrate the discriminatory intent necessary to establish a violation of the equal protection clause of the fourteenth amendment. I would accordingly affirm the judgment of the district court.

I

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968), the Supreme Court held that the enabling clause of the thirteenth amendment vests Congress with the power to identify "badges of slavery" and pass remedial legislation "necessary and proper" to eliminate them. *Id.* at 439-40, 88 S.Ct. 2186. In enacting 42 U.S.C. § 1982

Congress found discrimination against blacks in the sale and rental of property to constitute such a "badge of slavery" prohibited by the thirteenth amendment. *Id.* at 440-41, 88 S.Ct. 2186 § 1982 accordingly outlaws all racial discrimination, public and private, in the sale, rental, or holding of real property.

The majority's focus in this litigation is whether the right of black citizens residing north of Hein Park to "hold" their property in the same manner as white citizens residing in Hein Park would be violated by the erection of a traffic barrier on a street connecting the two neighborhoods. The majority concludes that the construction of the barrier will adversely affect black property owners north of Hein Park while at the same time benefiting white residents in Hein Park. In this disparate impact the majority discerns a violation § 1982 and the thirteenth amendment.

It is true that the scope of § 1982 is exceptionally broad, reaching all public and private discrimination in activity affecting real and personal property. *Jones,* 392 U.S. at 437-39, 88 S.Ct. 2186. The statute's proscription of racial discrimination against a citizen "holding" real property does not, however, preclude the legitimate exercise of a municipality's police powers. Where, as here, a municipality exercises those powers in a rational manner to achieve permissible goals,[1] absent evidence of racial motivation or intent, the right to "hold" property in the manner secured by § 1982 is not violated.

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1. The stated objectives of the application to close West Drive were: 1) to reduce the flow of traffic; 2) to enhance safety for children who walk to school; and 3) to reduce traffic pollution in the residential area such as noise and litter. The legitimacy of these goals is well established. *See Arlington County Board v. Richards,* 434 U.S. 5, 7, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

The right to "hold" property is the right to maintain possession while enjoying the privileges and benefits which ownership or occupancy entails in a manner untainted by racial discrimination. That right does not include an inviolate license of universal street access. Rather, street access, falling as it does within the category of land use, is a subject exclusively within the legislative province and subject to regulation in the public interest.[2] There is no requirement that legislative decisions regarding land use affect all persons equally. By definition, a street closing will not result in an identical impact upon residents and non-residents.

The closing of West Drive would have a disproportionate impact both racial and geographical in nature. As a result of racial residential segregation in the area, the black neighborhood north of Hein Park will no longer have access to West Drive, while the white Hein Park neighborhood will enjoy the increased solitude and safety accruing from a decrease in traffic. While distinctions based on race are inherently suspect, distinctions between residents and non-residents of a local neighborhood are not invidious. *Arlington County Board v. Richards,* 434 U.S. 5, 7, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977).

In light of the deference accorded legislative judgments in matters of land use regulation,[3] and because the district court's finding of an absence of racial motivation is supported by the record, the proposal to close West

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2. Although matters of land use are within a municipality's police powers, the wide latitude in classifying and limiting property uses is always "[s]ubject to specified constitutional limitations." *Berman v. Parker,* 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

3. *See Arlington County Board v. Richards,* 434 U.S. 5, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Drive must be viewed as creating a distinction based upon residency, not upon race. Since distinctions between residents and non-residents are permissible, without proof of racial motivation or intent I cannot conclude that the racially disproportionate impact here is sufficient circumstantial proof of the racial discrimination outlawed by § 1982.

Indeed, today's decision represents an unfortunate overreading of section 1982. The majority's willingness to characterize the proposed street closing as a violation of § 1982 demonstrates the need for a limiting principle for actions brought under this section. The section 1982 screening mechanism, as in actions proceeding directly under the fourteenth amendment, should be a requirement of a showing of discriminatory intent.

Although the district court did not analyze the case under § 1982 and the thirteenth amendment, the majority faults the district judge for placing "too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment." The district court, however, did no more than follow the directions issued by this court in remanding the case:

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; *he must prove racial motivation, intent or purpose,* in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976) (emphasis added).

The majority dismisses this instruction as dictum and does not address the question of whether cases brought

under § 1982—like cases brought directly under the fourteenth amendment—always require proof of discriminatory intent. I believe that we are required to follow the explicit instructions of our prior decision regarding the components of a § 1982 claim, and would therefore require a showing of discriminatory intent to establish a violation of section 1982.

Interpreting section 1982 to require discriminatory intent is consistent with the Supreme Court's admonition in *Jones* that Congress intended section 1 of the Civil Rights Act of 1866—the source of § 1982—"to prohibit *all racially motivated* deprivations of the rights enumerated in the statute . . . ." 392 U.S. at 426, 88 S.Ct. at 2196 (emphasis added). Section 2 of the 1866 Act reinforces the requirement of racial intent by imposing sanctions upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.

The legislative history of § 1982 also indicates that it should parallel the fourteenth amendment's standard of proof. Although the 1866 Act, the forerunner of § 1982, is generally regarded as a "Thirteenth Amendment statute," *see Jones*, 392 U.S. at 422, 437-38, 88 S.Ct. 2186, it has also been found to rely on the fourteenth amendment. The fourteenth amendment was enacted, in part, to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436, 88 S.Ct. 2186. It is not unreasonable to conclude that the standards for establishing a prima facie case of discrimination under § 1982 and the equal protection clause of the fourteenth amendment should be the case: there must be proof of discriminatory intent.

Finally, an observation made by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), is relevant here. The court was con-

cerned about the problems that could be generated if the fourteenth amendment was violated by a mere showing of disparate racial impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248, 96 S.St. at 2051-2052 (footnote omitted).

Section 1982, extending as it does to the expansive realm of both public and private action involving property, might well precipitate many of these same consequences if proof of discriminatory intent is not required. For these reasons, I cannot agree that the facts and circumstances of this case establish a violation of 42 U.S.C. § 1982.

II

The district court based its decision in favor of the City of Memphis on the plaintiffs' failure to establish the requirements of a prima facie case under the equal protection clause of the fourteenth amendment. The district court found that the closing of West Drive would have a "disproportionate impact on certain black citizens," but

there was not "sufficient proof or racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." Moreover, the district court did not believe that the disparate impact was so stark that an intent of racial discrimination could be inferred. I conclude that the district court's findings of fact and conclusions of law are neither clearly erroneous, F.R. Civ.P. 52(a), nor incorrect as a matter of law.

Recent Supreme Court decisions mandate that to establish that a governmental defendant has deprived plaintiffs of constitutional rights guaranteed by the fourteenth amendment, something more than a disproportionate discriminatory impact must be shown. Proof of a racially discriminatory intent or purpose is also required to show a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 239-45, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The recent opinion of *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), provides a functional definition of "intent":

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 179 [, 97 S.Ct. 996, 51 L.Ed.2d 229] (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. 442 at 279, 99 S.Ct. at 2296 (footnote omitted).

Applying the Supreme Court's elaboration in *Feeney* of the *Washington v. Davis* and *Arlington Heights* impact-

plus test, the district's court's conclusions are, if anything, reinforced. The record contains not even a scintilla of evidence indicating that the Memphis City Council approved the proposal to close West Drive "because of" the adverse effects the black citizens north of Hein Park might experience.

The absence of evidence of discriminatory intent does not, however, signal the end of the inquiry. Under the applicable *Arlington Heights* criteria, "invidious discriminatory purpose" can be inferred or detected through an inquiry which weighs a number of factors. Proof of discriminatory intent does not pose an insurmountable obstacle because *Arlington Heights* liberalized the probative value of various kinds of circumstantial evidence relevant in an inquiry into motive.

The first *Arlington Heights* factor—disparate impact—is present here. As I indicated, the disparate impact of the closing of West Drive is both racial and geographical in nature. I believe that the district court was correct in concluding that this disparity does not constitute a stark pattern of discrimination from which racial intent can be inferred. It is clear that disparate impact, standing alone, will only infrequently suffice to establish an equal protection violation. *Washington v. Davis,* 426 U.S. at 242, 96 S.Ct. 2040; *Arlington Heights,* 429 U.S. at 265-66, 97 S.Ct. 555. Absent a stark pattern of discrimination from which intent may be inferred, further inquiry is necessary.

The second evidentiary source bearing on intent is the historical background of the decision. Particularly relevant here would be a "series of official actions taken for invidious purposes." *Arlington Heights,* 429 U.S. at 267, 97 S.Ct. at 564. Upon careful examination, the background of the decision to close West Drive appears untainted by any invidious action. The legislative machinery was set

in motion by the submission of an appropriate application to the Planning Commission. The Commission processed the application and in time, the City Council voted to approve the closing. In sum, the "background" of this decision fails to reveal racial intent. And the same result is reached in considering the third factor specified in *Arlington Heights*—the specific sequence of events leading to the challenged decision.

The district Court's opinion does not record any instances of departures from normal procedural sequences or any "substantive" departures from normal decisionmaking (the fourth and fifth *Arlington Heights* factors). To the contrary, the decision to approve the closing of West Drive is consistent with the approvals granted other applications to close streets and alleys. It is true that the West Drive application is the first attempt to close a street in the nature of West Drive. Yet I cannot subscribe to the view that the initial attempt to utilize procedures prescribed by law for closing a street, without more, constitutes circumstantial proof of racial bias.

Where, as here, the applicable *Arlington Heights* "evidentiary sources" for a gleaning of official intent fail to reveal direct and circumstantial proof of discriminatory intent, an inference of invidious purpose cannot be drawn. I do not find from the record before me that in closing the street the City infringed upon constitutional rights, nor do I find that the City acted with malice or intent to discriminate because of race. Therefore, I would affirm the district court's decision that the fourteenth amendment has not been violated.

(Filed December 11, 1979)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

78-1527

N. T. GREENE,
Plaintiff-Appellant,

and

EDWIN OWENS, et al.,
Plaintiffs-Intervenors-Appellants,

vs.

CITY OF MEMPHIS, et al.,
Defendants-Appellees.

ORDER

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges

Defendants-Appellees have filed herein a petition for rehearing with a suggestion that the petition be heard by the court sitting en banc. Less than a majority of the judges of this court who are in regular active service of this court having favored rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. Upon consideration, it appearing that the petition presents no issues which have not already been fully considered by the court.

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Judge Celebrezze would grant the rehearing for the reasons set forth in his dissenting opinion previously filed.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

(Filed January 18, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1527

N. T. GREENE,
Plaintiff-Appellant,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

(Filed January 18, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1528

N. T. GREENE,
Plaintiff,

ELNORA PRIEST CROSS, DEWIN OWENS AND
CAROLYN BURSE,
Intervenors-Appellants,

vs.

CITY OF MEMPHIS, WYETH CHANDLER, THE
COUNCIL OF THE CITY OF MEMPHIS
AND EDWIN McBRAYER,
Defendants-Appellees.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by Order of the Court
/s/ John P. Hehman
John P. Hehman, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS,
AND EDWIN McBRAYER,

PETITIONERS,

VS.

N. T. GREENE,
ELNORA PRIEST CROSS,
EDWIN OWENS, AND
CAROLYN BURSE,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS,
AND EDWIN McBRAYER

PETITIONERS,

VS.

N. T. GREENE,
ELNORA PRIEST CROSS,
CAROLYN BURSE,
AND EDWIN OWENS,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals is now reported at 610 F.2d 395. The Opinion of the District Court is not reported but is printed in Appendix A to the Petition at pp. 19-37.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether any intent necessary to establish a violation of 42 U.S.C., Section 1982 and the Thirteenth Amendment to the United States Constitution can be inferred from a "stark" pattern of racial discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the Appendix to the Petition at pp. 3-5.

STATEMENT OF THE CASE

Procedural Background

The Petitioners' statement of the procedural background of this case is substantially correct. There are, however, certain points which Respondents feel are worthy of note.

It should first be noted that following the Sixth Circuit's initial remand (Greene I) 535 F.2d 976 (6th Cir., 1976) the district court not only allowed intervention by Respondents Burse, Owens, and Cross, but also allowed an amended complaint which included specific allegations that Respondents' rights as protected by 42 U.S.C. 1982 would be violated by the closing of West Drive because the closing would decrease the value of the real property of the black residents of the area north of the proposed closure. The action, therefore, became much broader following the remand and was presented to the district court accordingly.

In remanding Greene I to the district court for trial, the United States Court of Appeals for

the Sixth Circuit by way of dicta (the characterization given the comments by the Court itself, A41) stated:

> To establish a Section 1982 or 1983 claim on remand, Greene must prove his allegations that City officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively command an inference of racial motivation.(A17)

This language is of particular importance in that it appears that the district court read this language as setting the parameters of its consideration of Plaintiff Greene's initial allegations as well as the expanded allegations and proof presented by Respondents. Consequently, it appears that the focus of the court's inquiry on remand was to ascertain whether whites had sought street closings and had been granted same in situations in which similarly identified blacks had sought street closings but had been denied.

Following the District Court's adverse ruling, Respondents sought a Stay Pending Appeal but this request was denied. Due to cost considerations, no appeal was taken from this adverse ruling. On or about February 27 , 1978, Defendant proceeded with the closing of West Drive although sworn representations had been made that such would not be done until the litigation was over.

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of

the district court. The cause was remanded for the fashioning of appropriate injunctive relief.

STATEMENT OF FACTS

Because of the thoroughness of the Statement of Facts in the Petition, Respondents will mention only those facts not adequately covered or noted therein. Geographically, and by street name, the proper focus is on Jackson Avenue, a major thoroughfare running east and west in the City of Memphis. The residents to the north of Jackson Avenue are all black. (Tr. 323-324). The residents immediately south of Jackson Avenue are all white. (Tr. 323-324). West Drive, the thoroughfare in question, represents Springdale's southerly extension through the all white Hein Park area. Springdale runs north and south through the all black neighborhood but reaches its terminus at the north side of Jackson Avenue. Except for the change of nomenclature, the same Springdale Street that runs throughout the black area is extended through the all white Hein Park area by West Drive, which begins where Springdale Street leaves off on the northern side of Jackson Avenue. Inasmuch as West Drive represented a logical and convenient extension of Springdale Street, many of the black residents of the area north of Hein Park used it as an essential and convenient thoroughfare for both pedestrian and vehicular traffic.

In July of 1973, the residents of the Hein Park area initiated governmental procedures to close off West Drive at its terminus with Jackson Avenue

so as to effectively "dead-end" Springdale at the point where it exited the black community and entered the white community. The procedure followed by the residents in having West Drive closed involved the two property owners on either side of West Drive at its connection with Jackson Avenue purchasing from the City that section of West Drive, the public street, that bordered their property. According to the City of Memphis, the other residents along the street were not legally required to take part in the process of closing the street. This was the first time in the entire history of the City of Memphis that this procedure was employed to close a dedicated and "in use" public thoroughfare. [1]

---

[1] The following findings made by the district court are also noteworthy:

- That Hein Park "was developed well before World War II as an exclusive residential neighborhood for white citizens, and these characteristics have been maintained". (A 21).

- That the black citizens who live north of Hein Park are "primarily the persons who will be inconvenienced by the so called closing of West Drive". (A21).

- That Ms. Sara Terry, a white resident at 732 West Drive, testified that the closure was being sought to eliminate "undesirable traffic". (A23).

- That the proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. (A32).

- That the closure of West Drive, in the manner adopted by the City Council, will have a disproportionate impact on certain black citizens. (A34).

- That the Court "should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the Fire and Police Departments, and the inconvenience and delay to Sanitation Department employees:". (A 36).

Prior to the West Drive incident, this process had only been used to close alleys and dedicated, but not opened, streets. Nor was the closing here a part of a large comprehensive community preservation effort; to the contrary it represented only the wishes of the island community of Hein Park. According to documents and testimony, the residents felt this action necessary to bring about tranquility and to rid themselves of "undersirable traffic" coming through the community. There was absolutely no proof presented as to why other less restrictive means of decreasing or controlling traffic were not tried. Although questions were raised regarding these other possibilities, the record is completely void as to why measures such as decreased speed limits, limited access hours, speed breakers, or rigid enforcement of speed limits were not feasible means of curbing any undesirable traffic. All other entrances to the Hein Park area remain open, particularly the south end of West Drive which connects with North Parkway, one of Memphis' main thoroughfares. The North Parkway-West Drive intersection is populated totally by whites.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Decision Below Does Not Raise The Question Presented In The Petition*

Although Petitioners state the Question Presented as one involving the requisite intent necessary to establish violations of 42 U.S.C. Section 1982, and of the Thirteenth Amendment, that question was not passed upon by the Sixth Circuit and hence is not appropriate for review here. To the contrary, the Court of Appeals stated:

> We expressly leave open here, the question to what extent intent is ever an element of the Plaintiffs' case under Section 1982. (A57)

While Petitioners set forth two questions as presented for review in this matter, both questions, in essence, raise the question of intent. This matter is, therefore, one in which the only question for which certiorari is sought is one that was not passed upon below. It is well established that in such cases the writ should not be granted. McCullough v. Kammerer Corp., 323 U.S. 327, (1945) and Abbott Laboratories v. Gardner, 387 U.S. 136, (1967).

The thrust of Judge Celebrezze's dissent and of the Petitioners' argument, is that the majority should have required a showing of intent or purpose to establish a violation of Section 1982, that the standards for establishing a violation of Section 1982 should be the same as for establishing a violation of the Equal Protection Clause, and that the closing of West Drive was a proper exercise of the city's police powers. The simple truth of the matter is that the court below found it unnecessary to decide the issue of whether a showing of intent is required to establish a violation of Section 1982 because "under the unique circumstances shown here" (A58) intent was established if it is required. This is the only logical explanation for Judge Engel's comment that "we expressly leave open here the question to what extent intent is ever an element of the Plaintiffs' case under Section 1982". (A57). If this Court's holdings in Washington v. Davis, 426 U.S. 229, (1976) and Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, (1977), are read to mean that intent is required to establish

a violation of 42 U.S.C. 1982, then the decision of the Sixth Circuit should stand because the court in fact found intent. If, on the other hand, intent is not required, the Sixth Circuit's findings of intent can be treated as mere surplusage and the decision allowed to stand on the indicia of discrimination cited by the district court and the Court of Appeals' majority opinion.

Although the majority of the court below expressly avoided the question of the extent that intent is ever an element of proof under Section 1982, it is clear that the Court did not rest its decision on impact alone but determined that the instant case is among those in which the disparate impact is so stark that intent (if it is necessary) to establish a violation of 42 U.S.C. 1982) may be inferred. See Yick Wo v. Hopkins, 118 U.S. 356, (1886); Guinn v. United States, 238 U.S. 347, (1915); Gomillion v. Lightfoot, 364 U.S. 339, (1960). See also Turner v. Fouche', 396 U.S. 346, (1970) and Sims v. Georgia, 389 U.S. 404 (1967).

In summary, Judge Engel conducted the "sensitive" inquiry, Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, and gave the required "liberal construction" to 42 U.S.C. 1982, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and found that the proof was sufficient to support an inference of intent.

Accordingly if Petitioners attempt only to present the question of whether intent is necessary to establish a violation of 42 U.S.C 1982,

the foregoing discussion illustrates that that question is, at best, an academic one and that, therefore, certiorari should not be granted. Regardless of how the Petitioner attempts to assert the question, the clear implication therefrom is that the Court of Appeals decided the case on the basis of impact alone. This is clearly not the case in that the Sixth Circuit, is reaching its decision, looked to and was guided by, indicia much stronger than impact alone.

2. The Authorities Cited By Petitioners Are All Distinguishable

While most of the arguments presented by Petitioners have been addressed above, there are some authorities relied upon by Petitioners which are clearly distinguishable. Petitioners rely heavily upon Mr. Justice Black's discussion of the applicability of the Thirteenth Amendment to the facts presented in Palmer v. Thompson, 403 U.S. 217, (1971). At the outset, it should be noted that any discussion of the Thirteenth Amendment in Palmer is of little value to the disposition of this case in that the major focus of the analysis in that case was on an equal protection violation under the Fourteenth Amendment. The denial of relief pursuant to the Thirteenth Amendment was almost parenthetical. In essence, what Mr. Justice Black said regarding the Thirteenth Amendment was that, although Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968), held that Congress has the power to "rationally determine what are the badges and incidents of slavery, and the

authority to translate that determination into effective legislation", id. at 440, Congress had passed no law to regulate the opening or closing of swimming pools. Palmer, 403 U.S. 227. Congress has, however, passed a law that establishes that the denial of the right to any citizen of the same right as is enjoyed by white persons to "hold" property is a "badge or incident of slavery" and violated of the Thirteenth Amendment. That law is 42 U.S.C., Section 1982. That fact is pivotal in the distinction between Palmer and the instant case.

In passing, however, it is instructive to note another observation made by Mr. Justice Black in Palmer. Having held that the record did not show state action affecting blacks different from whites, he warned that should citizens of Jackson or any other city be able to establish in court that public tax supported swimming pools are being denied to one group because of color and supplied to another, such persons will be entitled to relief. The purpose of this statement was to distinguish the situation presented in Palmer, where pools that remained open were not supported by public taxes and where the city had severed all its responsibility for maintenance, from the situation such as that presented by the instant case. In the instant case, the City remains fully responsible for the upkeep of West Drive, and public taxes, including those paid by respondents, will be used to support the maintenance.

Petitioners also rely heavily on the case of Personnel Administrator of Massachusetts v. Feeney

_____ U.S. _____ 99 S.Ct. 2282, 60 L.Ed. 2d 870 (1979) and Judge Celebrezze's treatment of that case in his dissent from the decision below. First of all, Feeney, does not establish a new definition or standard of intent, but in the words of Judge Celebrezze provides an "elaboration" of the "Washington v. Davis and Arlington Heights' impact-plus test". (A67). Further evidence of this is provided by the fact that this Court in Feeney cites with approval, Yick Wo v. Hopkins, supra, Quinn v. United States, supra, Lane v. Wilson, supra, and Gomillion v. Lightfoot, supra, all of which support Respondents' contention that if intent is indeed required to establish a violation of 42 U.S.C. 1982, the evidence in this case was sufficient to provide the bases for an inference of such intent. 60 L.Ed.2d 883.

Furthermore, insofar as Judge Celebrezze contends that the treatment accorded the white citizens who attempted to close West Drive is consistent with approvals granted in all other cases, such is clearly not the case. First of all, it is uncontradicted that the closing of West Drive was indeed unique in every sense of the word and that the City, up until this effort was undertaken had never used the procedure in question here to close a public thoroughfare. There is simply no comparison. Consequently, to the extent that Judge Celebrezze contends that the black persons who objected to the closing were treated precisely the same as whites, Respondents respectfully submit that his dissent is clearly without any factual basis.

Petitioners also contend that the closing of West Drive by the City of Memphis was a legitimate exercise of the City's police powers. This contention fails, however, because it is well established that an otherwise valid constitutional power cannot be used to attain an unconstitutional result. Western Union Telegraph Company v. Foster, 247 U.S. 105, (1918).

Petitioners cite Arlington County Board v. Richards, 434, U.S. 4, (1977)as supportive of their contention that the closing of West Drive as a legitimate exercise of the City's police powers. Richards is distinguishable in at least two major respects. First, Richards, did not involve a classification on the basis of the "paradigm" of race. 60 L.Ed.2d, 883. Consequently, the inquiry into the rationality of the distinction between residents and non-residents as was the case in Richards, is not subjected to the same scrutiny as is the racial situation presented by the instant case.

Furthermore, as a factual matter, the zoning action taken in Richards, was by no means an action taken solely at the behest of a handful of residents, but was pursuant to an overall policy implemented by way of an ordinance. Richards, 434 U.S. 6. At no time have the residents of Hein Park and West Drive contended that their action was designed to promote the "general" welfare. To the contrary, the proof shows that the closing of West Drive as requested by the Hein Park residents will simply bring about more traffic and congestion to the areas

immediately east and west of the Hein Park area. (A28). It is, therefore, clear that Richards is inapposite.

3. This Case Presents Unique Circumstances And Is Not Proper For A Writ Of Certiorari

Inasmuch as the Sixth Circuit classifies this case as one presenting "unique circumstances" it is proper to equate this matter with that presented to this Court in the case of Rice v. Sioux City Cemetery, 349 U.S. 70, (1954), a case characterized by Mr. Justice Frankfurter as presenting "rather unique circumstances" 349 U.S. p. 75, and in which the Court stated: "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. 349 U.S. at 74.

The facts in this matter illustrate clearly that many of the questions raised herein and many of the facts presented are quite academic and episodic. It is, therefore, clear that no special and important circumstances exist so as to justify the granting of the writ of certiorari. Indeed, as the *amicus curiae* brief points out, this case is governed by Gomillion v. Lightfoot, 346 U.S. 339 (1960) in that the closing clearly benefited the white residents of Hein Park to the detriment of the black residents of the area immediately north of Hein Park.[2]

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[2] The practical effect of the Opinion below is to deny equal protection of the law to the white residents of Hein Park. It is perfectly obvious from the pleadings of the Plaintiffs, and from the opinion from the Court of Appeals that the only reason why the City's action was challenged, and the only reason why the Court of Appeals struck it down, was because the residents of the area to be benefited were white. (Emphasis Added). If Hein Park had been predominently black, there would have been no ruling that the City's action violated the Thirteenth Amendment." [Brief Amicus Curiae, pp.7-8]

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served upon opposing counsel this Brief for Respondent in Opposition by mailing copies thereof to:

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This, the 24th day of March, 1980.

A C Wharton, Jr.
Counsel For Respondents-Intervenors

Supreme Court, U.S.
FILED
MAR 6 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH
CHANDLER, THE COUNCIL
OF THE CITY OF MEMPHIS
AND EDWIN McBRAYER,

Petitioners

v.

N. T. GREENE AND ELNORA
PRIEST CROSS, EDWIN
OWENS AND CAROLYN BURSE,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals For
the Sixth Circuit

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STATEMENT OF THE CASE

Amicus Curiae accepts for the purpose of this Brief the statement of the case as set forth in the Petition for Certiorari filed by the City of Memphis, et al., and also accepts the City's statement of the questions presented, and the constitutional provisions and statutes involved in the case.

REASONS FOR GRANTING CERTIORARI

Applicants concur in the statement of the City of Memphis in its Reasons for Granting Certiorari, and would supplement the same by the following reasons:

The opinion of the Sixth Circuit in this cause departs from all precedents and for the first time applies the term "badge of slavery" to a racially neutral action of a municipality, taken to accomplish a permissible goal, without any evidence of racial motivation or intent on the part of the City. The term "badge of slavery" is applied to the action of

the municipality in closing one end of a street running through a quiet residential subdivision, solely because the closing was found to affect black non-residents of the neighborhood differently from its effect on white residents of the neighborhood.

The District Court's Opinion (A19-A37)[1] contained no finding of any injury whatsoever to the Plaintiffs or those they represented. The Court of Appeals likewise made no finding of injury, but based its Order in part upon the fact that "there was some evidence, credited by the District Court of an economic depreciation in property values" in a neighboring area which was "predominantly black." (A56). The "evidence" relied upon was the testimony of Plaintiffs' expert witness, who testified affirmatively that there was no lessening of values in such area (A48). There is no basis whatsoever in the Opinion of the District Judge for the statement of

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[1] References are to the Petition for Certiorari filed by the City of Memphis.

the Court of Appeals that he "credited" that witness' testimony that the closing of the street would result in economic depreciation in property values elsewhere.

The decision below is directly contrary to a prior decision of the same Court in the same case on a prior appeal (A11-A18). On the prior appeal, the Court said:

> To establish a Section 1982 or 1983 claim on remand, Greene must prove his allegations that City officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation (A17).

In the Opinion under review, the Court admitted that the ruling of the District Court, upholding the municipal action on the ground

that it was not racially motivated, was supported by its above-quoted direction on previous appeal. Nevertheless, the Court reversed because it found that, despite the absence of racial intent or motive, the City's action was a "badge of slavery" (A53).

The decision below is directly contrary to the following decisions of this Court:

> Personnel Administrator of Massachusetts v. Feeney, ___ U.S. ___ 60 Ed.L.Ed.2d. 870 (1979);
>
> Arlington County Board v. Richards, 434 U.S. 5, 54 L.Ed. 4, 98 S. Ct. 24;
>
> Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 255, 50 L.Ed.2d. 97 S. Ct. 555;
>
> Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d. 597, 96 S. Ct. 2040.

In Personnel Administrator of Massachusetts, supra, the Court said:

> But, as was made clear in Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d. 597, 96 S. Ct. 2040 and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 255, 50 L.Ed.2d. 450, 97 S. Ct. 555, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

The Court further stated that:

> 'Discriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organization v. Carey, 430 U.S. 144, 179 51 L.Ed.2d. 229, 97 S. Ct. 966 (concurring opinion). It implies that the decision maker...selected or reaffirmed a particular course of action

at least in part 'because of', not merely, 'in spite of' its adverse effects upon an identifiable group. 60 L.Ed. at 888.

Judge Celebrezze, dissenting from the Opinion below, pointed that in Washington v. Davis, this Court had said:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However,

> in our view, extension of the rule beyond those areas where it is already applicable by reason of statutes, such as in the field of public employment, should await legislative prescription. 426 U.S. at 248.

The above cited cases have delineated a reasonable, rational and workable criterion within which municipal authorities can operate without fear that some incidental side effects of their legitimate actions may cause them to be judicially considered as "badges of slavery." The Opinion below will create great confusion in the law.

The effect of the Opinion below is to invalidate as a "badge of slavery" the identical type of governmental actions which this Court has held do not constitute a violation of equal protection of the laws.

The practical effect of the Opinion below is to deny equal protection of the law to the white residents of Hein Park. It is perfectly obvious from the pleadings of the Plaintiffs

and from the Opinion of the Court of Appeals that the only reason why the City's action was challenged, and the only reason why the Court of Appeals struck it down, was because the residents of the area to be benefited were white. If Hein Park had been predominantly black, there would have been no ruling that the City's action violated the Thirteenth Amendment.

The effect of the ruling is that the residents of Hein Park were not entitled to reasonable and necessary protection by their City government, solely because they were members of the white race. Such a ruling stultifies the concept of equal protection of the law.

The decision of the Court of Appeals in this case is contrary to the precedents of this Court and of its own former opinion. It is unfair and unjust to the citizens of Memphis and discriminates invidiously against the residents of Hein Park. It needs and deserves correction by this Court.

WHEREFORE, the Amicus Curiae respectfully submits that the Petition

of the City of Memphis for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1979
No. 79-1176

CITY OF MEMPHIS, ET AL.,
Petitioners,

vs.

N. T. GREENE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The October 4, 1974, "Order on Motions to Dismiss" filed by the District Court for the Western District of Tennessee, Western Division, has not been officially published, and appears in the Appendix at page 28.[1] The

1. All references to Appendices to this Brief are hereafter preceded by designation "A".

opinion of the Sixth Circuit Court of Appeals, decided May 13, 1976, reversing the October 4, 1974, district court order, and remanding the cause back to the district court, is reported at 535 F.2d 976 (6th Cir. 1976) and is printed at A. 36. The memorandum decision of the District Court for the Western District of Tennessee, Western Division, filed June 21, 1978, has not been officially published and appears at A. 146. The opinion of the Sixth Circuit Court of Appeals filed November 1, 1979, reversing the district court judgment and remanding the cause for the fashioning of appropriate injunctive relief, is reported at 610 F.2d 395 (6th Cir. 1979) and appears at A. 165. The order of the Sixth Circuit Court of Appeals denying the petitioners' petition for rehearing with a suggestion that the petition be heard by the court sitting en banc was filed December 11, 1979, and has not been officially published. It appears at A. 198.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered November 1, 1979. On December 11, 1979, the court filed an order denying the petitioners' request for rehearing with a suggestion that the petition be heard by the court sitting en banc. A petition for a writ of certiorari was timely filed with this Court and granted on May 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved in this case is the Thirteenth Amendment to the United States Constitution. This Amendment reads as follows:

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. Vol. 1 U.S.C. pg. XLVII (1964).

The federal statutory provision involved in this case is 42 U.S.C. §1982. 42 U.S.C. §1982 (1964) provides in Vol. 9 U.S.C. pg. 8020:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The Charter of the City of Memphis, Tennessee, provides on page 198 in Section 452 as follows:

The governing authorities of said City of Memphis shall have full authority to convey any property acquired by them or held by the City of Memphis not used for municipal purposes, and to give good title thereto to any purchaser. Said City shall also have power to convey any street or alley closed by it by virtue of municipal authority, and to convey good title to said street or alley as far as any title held by said City is concerned. The said City shall further have authority to close by resolution any street or alley whenever, in the judgment of the Board of Commissioners, the closing of said street or alley shall be conducive to the public welfare. (Priv. Acts 1913, ch. 163; Priv. Acts 1939, ch. 173, Section 2.)

QUESTIONS PRESENTED

1. Whether a municipality's exercise of its police powers in closing a street to through traffic in order to achieve in a residential area permissible goals of reducing the flow of traffic, enhancing safety, and reducing noise and litter, constitutes a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution, when there is no evidence that racial motivation or intent was a factor in the decision.

2. Whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution can be established without a showing of racially discriminatory intent or purpose.

STATEMENT OF THE CASE

Procedural Background

This action originated in 1974 with the filing of a complaint in the United States District Court for the Western District of Tennessee, Western Division, by N. T. Greene, and others who are no longer active participants in the lawsuit. The complaint alleged that the proposed partial closing to through traffic of a portion of a public residential street, known as West Drive, located in the City of Memphis, Tennessee, was racially discriminatory. This portion of the complaint, as amended, was dismissed by the district court upon a Motion to Dismiss filed on behalf of defendants. (A. 28).

On appeal the United States Court of Appeals for the Sixth Circuit reversed and remanded the cause on the basis that, in the court's opinion, the original plaintiff, Greene, had stated claims upon which relief might be

granted under 42 U.S.C. §1982 and 42 U.S.C. §1983. See *Greene v. City of Memphis*, 535 F.2d 976 (6th Cir. 1976). (A. 36).

In its opinion remanding the cause, the court stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. §1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, [citations omitted] reasonably aver that the closing confers certain benefits, to wit, the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis than similarly situated whites who "hold" their "real property" subject to having the City confer the dead-end street benefit on their property.
>
> . . . .
>
> We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. *Id.* at 978-79. (A. 39, 40).

After remand, intervention was allowed for plaintiffs Owens, Burse, and Cross. (A. 57). Jurisdiction in the dis-

trict court was based on 28 U.S.C. §1343 (3) and (4). (A. 82). A two-day trial was held before the trial judge without the intervention of a jury. On June 21, 1978, the district court held that the partial closing of West Drive would not violate plaintiffs' rights under either 42 U.S.C. §1982, 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, or pendent State law claims. The court set forth its findings of fact and conclusions of law in a memorandum decision. (A. 146). The trial court held, making reference to the Sixth Circuit's earlier observations,

> that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens. (A. 159).

The court further held that "there is not sufficient proof of racially discriminatory intent or purpose on the part of the City officials to establish a constitutional violation." (A. 161). The court also found that there were not any violations of the plaintiffs' rights under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of the district court. The cause was remanded for the fashioning of appropriate injunctive relief. (A. 165, 186).

The Sixth Circuit majority opinion concluded that the erection of a barrier at the northern boundary of West Drive constituted a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment to the United States Constitution and entitling them to relief under 42 U.S.C. §1982. (A. 185).

A dissenting opinion was filed by Circuit Judge Anthony J. Celebrezze, noting that the majority opinion expanded the scope of 42 U.S.C. §1982 to an unprecedented extreme and conflicted with the well-established policy of judicial deference to legislative judgment in land use regulation. The dissenting opinion stated that a finding of discriminatory intent or purpose should be required to establish a violation under 42 U.S.C. §1982.

Petitioners asked for a rehearing with a suggestion that the rehearing be held en banc; however, since less than a majority of the judges of the court who were in regular active service favored a rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. The original panel denied the petition for rehearing, with Judge Celebrezze again dissenting, on December 11, 1979. (A. 198). A petition for writ of certiorari was timely filed with this Court, and certiorari was granted on May 12, 1980.

Statement of Facts

On July 9, 1973, an application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association, requesting the closing of a portion of a public residential street known as West Drive, which would make that street into a cul-de-sac. The application states that the reasons for the requested closure are to:

(1) Reduce flow of through traffic using subdivision streets.

(2) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School.

(3) Reduce "traffic pollution" in a residential area, e.g., noise, litter, interuption [sic] of community living. (A. 135; Trial Exhibit 13; Transcript, pages 19 and 148).[2]

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government to learn their opinions regarding the closure. The information sought was of an advisory nature and was not controlling upon either the Planning Commission or the City Council. After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (A. 130; Tr. Ex. 4; TR. 19, 173-74).

The matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of a resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing, including respondent Greene. Each side was given fifteen minutes to present its views. (Tr. Ex. 26; TR 19).

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2. Hereafter, references to Trial Exhibits will be designated, Tr. Ex., followed by the appropriate number; references to pages of the Transcript will be designated TR., followed by the appropriate page number.

After the presentations were made and discussion was had among the members of the City Council, a vote was taken on the resolution to close a portion of West Drive with certain conditions, and the resolution passed. (A. 126; Tr. Ex. 1 and 26; TR 19).

On several subsequent occasions the City Council reconsidered its action, and each time voted in favor of closing a portion of West Drive to through traffic. (A. 126; Tr. Ex. 2, 27-32, and 41; TR. 19).

The closing procedure used by the City Council had never before been used to close a street that served as a thoroughfare for the residents and the public. It had, however, been used on numerous other occasions to close alleys and dedicated, but unused, streets. From that standpoint the closing procedure used by the City Council has benefited black citizens, as well as white citizens. (Tr. Ex. 33-34, 36-37, and 39; TR. 19, 257-60, 262-70).

West Drive is a two-lane residential street, beginning on the northern boundary at its intersection with Jackson Avenue and proceeding in a southerly direction to its terminus at its intersection with North Parkway, approximately one-half mile from its beginning at Jackson Avenue. Opposite West Drive on the north side of Jackson Avenue is Springdale Street, a major four-lane thoroughfare. The proposed closing was to be accomplished by means of removal of the existing curbs and installation of a curb and sidewalk parallel to the south side of Jackson Avenue. (A. 145; Tr. Ex. 13; TR. 19).

One block to the east is a street that gives straight access all the way to south Memphis and the State of Mississippi. To the west are University and McLean Streets, which are major thoroughfares offering additional access to south Memphis and to Overton Park and Snowden

School. (TR. 205-06). Access to the Hein Park Subdivision remains available on the northern side at the intersection of Jackson and Charles Drive. (TR. 205).

At the time the City Council voted to close a portion of West Drive and at the time of the trial in the district court, all of the residents along West Drive were white. During the closing argument of counsel, the district court took judicial notice that that area north of Jackson Avenue in this vicinity was predominantly black. (TR. 323-24).

SUMMARY OF ARGUMENT

The basic question before this Court is whether there can be established a violation of 42 U.S.C. §1982 and the Thirteenth Amendment without a showing or finding of racially discriminatory intent or purpose.

This Court has essentially developed two approaches concerning the elements necessary to establish a prima facie case of race discrimination—the "disproportionate impact" test, as described in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the "disproportionate impact plus intent" test, as developed by *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *City of Mobile v. Bolden*, 100 S. Ct. 1490 (1980).

The Thirteenth Amendment, which abolished slavery and involuntary servitude, empowered Congress to enforce the Amendment by appropriate legislation. Pursuant to the authority granted Congress, the Civil Rights Act of 1866 was enacted. Section 1 of this Act is now codified as 42 U.S.C. §1981 and §1982. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court upheld the constitutionality of §1982, recognizing that the enabling clause of the Thirteenth Amendment empowered Congress to pass laws necessary and proper for abolishing all badges and

incidents of slavery and, pursuant to that power, to determine what are "badges" and "incidents" of slavery. The Court further concluded that among the badges and incidents of slavery were restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 392 U.S. at 441.

In *Palmer v. Thompson,* 403 U.S. 217 (1971), the Court added that the power to define and prohibit "badges" and "incidents" of slavery exists in the enforcement power of Congress under the Thirteenth Amendment, not in the Amendment's self-executing force. As such, the Court must look to the congressional intent in enacting legislation pursuant to Section II of the Thirteenth Amendment in order to determine the definitions and prohibitions of badges of slavery.

In studying the legislative history of the Civil Rights Act of 1866, the predecessor of 42 U.S.C. §1982, it becomes abundantly clear that it was the intent of Congress to prohibit only those actions performed with a discriminatory motivation or purpose.

In looking at the two possible approaches, it is apparent from this Court's opinion in *Davis, supra,* that there is an understandable reluctance to expand the use of the disproportionate impact test of *Griggs* beyond those areas where it is clearly applicable by statute.

The Court in *Davis* held that it was not disposed to adopt the more rigorous standard of *Griggs* in applying Fifth and Fourteenth Amendment requirements to the seemingly reasonable acts of administrators and executives. The Court reasoned that any extension of the "disproportionate impact only" test beyond those areas where it was already applicable should await legislative prescription.

Section 1982, extending as it does to both public and private actions involving property, *Jones, supra,* might well precipitate many of the same consequences feared by the Court in *Davis,* if proof of discriminatory intent is not required. As evidenced by the case now before the Court, such a test can invalidate otherwise reasonable legislation or actions of a local governing body on the sole basis that they benefit or burden one race more than another.

In *Arlington Heights, supra,* the Court held that an official action by a governing body will not be found unconstitutional solely because it results in a racially discriminatory impact. In recognizing the difficulties of proof involved in such a case, the Court held that a "sensitive inquiry" is necessary into any circumstantial or direct evidence of intent. The Court therein suggested several evidentiary tests for determining such intent: . (1) the historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) departure from the sequence, (4) substantive departures, and (5) the legislative or administrative history.

In *Palmer, supra,* the Court once again was faced with the problem of judicially reviewing the actions of a local governing body. In upholding the decision of the City to close its pools, the Court recognized that the closings affected everyone equally, whether black or white, and that there was substantial evidence to support the City Council's decision that the pools should be closed because they could not be operated safely or economically on an integrated basis. The Court therefore found no violation of plaintiffs' rights as guaranteed by the Equal Protection Clause. The Court also dismissed plaintiffs' argument that the City's closing of the pools constituted a badge of slavery in violation of the Thirteenth Amendment.

It is the contention of Petitioners herein that the action now before the Court can no more be said to be a "badge or incident" of slavery than could the closing of pools in *Palmer*.

It is further contended by Petitioners herein that the action taken by the Memphis City Council was in the nature of a land use decision and that, consequently, much deference should be accorded to its decision. See *Arlington County Board v. Richards*, 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

In *Arlington County Board* this Court further recognized that a municipality may decide, as did the Memphis City Council herein, that a reduction of the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter, and that such a decision, in and of itself, does not violate the Constitution.

It is urged by the Petitioners herein that an approach similar to that used in *Arlington Heights* should be applied to this case. In so applying this test, based upon the record, the result should be that, while there might be a finding that the action of the City Council has a disproportionate impact on certain black citizens, which is debatable, the impact was certainly not so stark as to be found unexplainable on grounds other than race and thereby support an inference of a discriminatory purpose or intent. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), nor is there proof of a racially discriminatory intent or purpose on the part of City officials, required to establish a constitutional violation.

ARGUMENT

Introduction

The City of Memphis through its Charter clearly has the authority and power to close by resolution any street or alley when, in the judgment of the City Council, such a closing is determined to be in the best interest of the public welfare. Sec. 452 Memphis City Charter; Priv. Acts 1913; Priv. Acts 1939, Ch. 173, Sec. 2. Based upon this authority, the City has in fact developed a procedure whereby such street and alley closings may be effected. (Tr. Ex. 15; TR. 19, 145-46).

Pursuant to this street and alley closing procedure, members of the Hein Park Civic Association filed an application to close a portion of West Drive, thereby stopping the flow of through traffic. According to the record in this case, the reasons given by the association for requesting the closure were in fact reasonable and legitimate. (A. 135; Tr. Ex. 13; TR. 19). This application was processed as any other street and alley closing application had been in the past, including applications made by black citizens. (Tr. Ex. 33-34, 36-37, and 39; TR. 19, 257-60, 262-70).

The City's Planning Commission, after studying the matter, recommended to the City Council that they approve the application on the basis that a closure would help preserve the Hein Park neighborhood as a tranquil midtown subdivision. (A. 130, 121-22; Tr. Ex. 4; TR. 19, 204-05).

After a public hearing, wherein both proponents and opponents of the application were heard, the City Council approved a resolution to close the north entrance of West Drive. (A. 126; Tr. Ex. 1, 26; TR. 19).

The District Court, after considering all the evidence produced during the two-day trial of this matter, con-

cluded that the closure of West Drive would have a disproportionate impact on certain black citizens, but further concluded that there was not sufficient proof of racially discriminatory intent or purpose on the part of city officials to establish a constitutional violation. The court further found that the disparate impact was not so "stark" that a purpose or intent of racial discrimination could be inferred. (A. 161).

Despite these findings by the District Court, the Court of Appeals held that the trial court had placed too high a threshold upon the requirements of 42 U.S.C. §1982 and the Thirteenth Amendment. (A. 180). The Court of Appeals went on to hold that, based upon the trial court's own findings, the pattern of discrimination constituted a "badge of slavery", violative of plaintiffs' rights under the Thirteenth Amendment and entitling them to relief under 42 U.S.C. §1982. (A. 185).

The issue raised is whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment can be established without a showing or finding of racially discriminatory intent or purpose.

"Impact Only" Test v. "Impact Plus Intent" Test

This Court has thus far developed two approaches concerning the elements necessary to establish a prima facie case of race discrimination. Under Title VII of the Civil Rights Act of 1964, it is now settled that a plaintiff may state a cause of action by simply proving that he was damaged by the operation of an employment practice that, although neutral on its face, is shown to have a racially disproportionate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). At the same time, this Court has held that to state a claim under the Equal Protection Clause, a plaintiff must produce proof of a disproportionate

impact and an intent to discriminate. *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *City of Mobile v. Bolden,* 100 S. Ct. 1490 (1980).

In *Griggs, supra,* the Supreme Court announced that Title VII forbids the use of standards that, though apparently neutral, are discriminatory in operation, unless the employer meets the burden of proving that the standards are job related. Writing for a unanimous court, Chief Justice Burger emphasized Congress' intention, as discerned from the language of Title VII, to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30.

The result is that a plaintiff alleging discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 could prevail upon a showing of disproportionate impact alone, even without a showing of intent to discriminate.

The defendant employer had, prior to the passage of the 1964 Act, openly practiced racial discrimination in its employment practices, hiring blacks only for work in its Labor Department and not allowing blacks to work in any of its four other, higher-paying departments. Simultaneous with the passage of the 1964 Civil Rights Act, the employer initiated, for new employees seeking to work in any but the Labor Department, requirements of (1) a high school education and (2) passing scores on two aptitude tests. The Court held that Title VII was intended to remedy not only "overt" discrimination, but "practices that are fair in form, but discriminatory in operation." 401 U.S. at 431.

Though the newly-initiated requirements by the employer were racially neutral, and neither the District

Court nor the Court of Appeals had found intent to discriminate on the part of the employer, the Court felt that "artificial, arbitrary, and unnecessary" obstacles to equal employment opportunities were prohibited under Title VII. 401 U.S. at 431.

It is worth emphasizing that the holding in *Griggs* is an expression of the congressional intent, as determined from the language of the statute, to not only prevent discriminatory employment practices but to remedy past discrimination. The Court stated that, "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430. As will be shown, this contrasts with the intent of Congress in passing the Civil Rights Act of 1866, the statutory predecessor of 42 U.S.C. §1982. The Act of 1866 was designed to prevent discrimination on the basis of race in acquiring, holding, and conveying real and personal property, but was never intended and has not been interpreted to act as a remedy for past discrimination. To the contrary, the legislative history of that Act supports the requirement of an affirmative showing of racially motivated conduct before there can be a violation of the Thirteenth Amendment and 42 U.S.C. §1982.

In *Washington v. Davis, supra,* the Court made it clear that official action will not be found unconstitutional under the Equal Protection Clause solely because it results in a racially disproportionate impact.

In *Davis* several blacks, who had applied for employment as police officers and been unsuccessful because they failed a test of their verbal ability, brought a class action alleging racially discriminatory employment practices. The District Court, emphasizing that there was no

showing of intent to discriminate racially on the part of the police department and that, though a disproportionate number of black applicants had failed the test, the racial mix of the department was roughly in proportion with that of the recruiting area, held for the defendants. In reversing the District Court, the Court of Appeals applied a Title VII analysis to the alleged constitutional deprivation, holding that, once the plaintiffs had shown disproportionate impact, the burden shifted to the employer to prove the test was job-related, and that the defendants here had failed to meet this burden. The disproportionate impact was found in that a much higher percentage of blacks than whites had failed the test; other considerations, such as comparisons of the racial makeup of the department with that of the surrounding community, the Court found irrelevant.

This Court reversed. The "disproportionate impact alone" test of *Griggs* was inappropriate to the constitutional violation alleged in *Davis*. The Court declined to hold "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U.S. at 239.

> [The analysis by a Court under Title VII] involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this. *Id.* at 247-48.

After noting that the Fifth and Fourteenth Amendments serve the important purpose of preventing racial discrimination in official conduct, the Court in *Davis* ex-

pressed a concern that the furtherance of that purpose by application of the Title VII standard would be far outweighed by the concomitant disruption in the functioning of government. Application under the Equal Protection Clause of a disproportionate impact standard "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.* at 248.

Davis stands for the proposition that, to prove a constitutional violation, a plaintiff must show more than disproportionate impact alone, and that in such a case a *Griggs* rationale will not be used to shift the burden to the defendant of justifying a "seemingly reasonable" action. Further, the Court's recent decision in *City of Mobile v. Bolden, supra,* held that a showing of racially discriminatory motivation is a necessary element, not only when a violation of the Equal Protection Clause is alleged, but also when a Fifteenth Amendment violation is alleged.

Historical Background of the Thirteenth Amendment and 42 U.S.C. §1982

In an attempt to determine which of the above two approaches should be followed herein, it is necessary to first review the historical background of 42 U.S.C. §1982 and the Thirteenth Amendment.

The Thirteenth Amendment to the United States Constitution was ratified December 18, 1865, and consists of two sections. Section 1 states:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 states:

> Congress shall have power to enforce this article by appropriate legislation.

In essence, the Thirteenth Amendment in Section 1 abolished slavery and involuntary servitude, and in Section 2 gave Congress the power to enforce the amendment. The attitude of the legislators at the time was that the objective was to abolish slavery, not only in name but in fact, and to entrust Congress with the responsibility to enforce these provisions making all persons free.[3]

Pursuant to the authority granted Congress by Section 2, the Civil Rights Act of 1866 was enacted. Section 1 of the Act states:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory, in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefits of the law and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

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3. See *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1, 15 (1974), referring to statements made by Senator Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

Section 1 of the Civil Rights Act of 1866 later became enacted as 42 U.S.C. §1981 and 42 U.S.C. §1982. Section 1982 in its present form reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The modern view of the Thirteenth Amendment and 42 U.S.C. §1982 is stated in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), wherein the Court, in upholding the constitutionality of §1982, explained that, while the Thirteenth Amendment abolished slavery and established universal freedom, the enabling clause of that Amendment also empowered Congress to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. The Court further stated that, under the power granted by the Thirteenth Amendment, Congress has the power rationally to determine what are the badges and incidents of slavery and the authority to translate that determination into effective legislation. 392 U.S. at 439-40.

From this analysis, the Court concluded that among the badges and incidents of slavery were restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 392 U.S. at 441, quoting from *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

This Court has further expanded the use of the badge of slavery analysis in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973).

In line with this discussion, the question of the Thirteenth Amendment's self-executing force must be men-

tioned, although this question apparently is not properly before this Court.[4] In *Palmer v. Thompson,* 403 U.S. 217 (1971), the Court confronted this question and indicated that the self-executing force of the Thirteenth Amendment should be tightly confined.

In *Palmer* the City of Jackson, Mississippi, had closed its public swimming pools, which had previously been operated on a racially segregated basis, purportedly because the pools had been operated in previous years at a considerable loss to the city, and the city council felt that operating them on an integrated basis would only increase the financial loss to the city, as well as provide an opportunity for racial friction and possible disturbances. Petitioners brought an action to force the reopening of the pools on an integrated basis.

Petitioners argued that the city's closing of city-owned swimming pools imposed on black citizens of Jackson, Mississippi, a badge of slavery prohibited under the Thirteenth Amendment. After characterizing this argument as "faint and unpersuasive," the Court stated therein that "to reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history." 403 U.S. at 226.

The Court went on to reaffirm the *Jones* holding that Congress, under Section 2 of the Thirteenth Amendment, does have a broad power to "outlaw badges of slavery," but it noted that Congress had passed no law under that power to regulate a city's opening or closing of swimming pools. The Court recognized that, in the absence of such congressional legislation, for this Court to label such an

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4. In the majority opinion of the Court of Appeals the Court notes that they do not reach the question whether relief could be predicated directly on the Thirteenth Amendment. (See footnote 8 at A. 186).

action as a badge of slavery would give the Court "a law-making power far beyond the imagination of the amendment's authors." 403 U.S. at 227. The Court thus rejected the petitioners' badge of slavery contention, while at the same time affirming the importance of looking to the legislative intent in questions of statutory interpretation.

In so deciding, the Court made it clear that the power to define and prohibit badges and incidents of slavery exists in the enforcement power of Congress under the Thirteenth Amendment and not in the Amendment's self-executing force. The Court must therefore look to the Congressional legislation enacted pursuant to Section 2 of the Thirteenth Amendment to determine the definitions and prohibitions of badges of slavery.

Legislative History of the Civil Rights Act of 1866

To determine whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment can be established without a showing of racially discriminatory intent or purpose, attention must be directed to the intent of the legislators of the Civil Rights Act of 1866. There is no doubt that such legislative intent is the primary test for statutory interpretation.[5]

In studying the legislative history of the Civil Rights Act of 1866, it becomes abundantly clear that it was the intent of Congress to prohibit only those actions performed with a discriminatory motivation. The Congress at that time was concerned with securing to blacks the status of citizenship and the basic rights attached thereto. The Act

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5. R. Berger, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 136-37 (1977), citing *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *U. S. v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); and *U. S. v. Babbitt*, 66 U.S. 55, 61 (1861).

was meant to deal with the most obvious racially discriminatory conduct and was not designed to attack more subtle discrimination."

Senator Trumbull, the chairman of the Judiciary Committee and the bill's leading proponent, had cited examples of various state laws which had been enacted to discriminate against blacks in the exercise of their civil rights. Trumbull emphasized the need for "machinery to carry it [the Thirteenth Amendment] into effect." The "Black Codes," to which he referred,

> although they do not make a man an absolute slave, yet deprive him of the rights of a freeman . . . [and] a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void. CONG. GLOBE, 39th Cong., 1st Sess., 475 (1865).

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6. Even a proponent of application of a disproportionate impact only standard in §1981 and §1982 actions states that, "The Acts [of 1866 and 1870] were meant to deal with the most egregious forms of reactionary white conduct. . . . Even if it is accepted that the legislative history of the two Acts supports the Supreme Court's view [in *Jones*] that these laws were intended to regulate private behavior, it cannot seriously be argued that that legislative history also supports the contention that Congress meant these laws to outlaw any conduct with unintended racially disproportionate effects upon contracts. A reading of the relevant congressional debates reveals absolutely nothing that would lend credence to such a notion. On the contrary, these sources give every indication that these laws were intended only to outlaw those actions undertaken with invidious, discriminatory motivation." *Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267, at 1279-80. Also see *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y. L. Rev. 1030, at 1046-48.

Trumbull felt that the language of the Thirteenth Amendment prohibited all such racially discriminatory statutes, but that some legislative command was required to effectuate that intent. "The purpose of the bill under consideration [the Act of 1866] is to destroy all these discriminations and to carry into effect the constitutional amendment."[7]

However, even the proponents of the Act of 1866 did not conceive that the bill would remedy unintentionally discriminatory laws which might have a disparate impact on one race or another. Senator Trumbull stated, in response to a question concerning possible unintentional violations of the statute, that a violation would require "a union of act and intention." *Id.* at 477.

This Court in a dictum in *Jones v. Alfred H. Mayer Co., supra,* noted that the intent of Congress in passing Section 1 of the Civil Rights Act of 1866, as derived from a reading of the statute, was to prohibit *"all racially motivated* deprivations of the rights enumerated in the statute." 392 U.S. at 426 (emphasis added to "racially motivated"). The Court also stated its conclusion based upon the congressional history and the language of 42 U.S.C. §1982, that §1982 "encompass[es] every *racially motivated* refusal to sell or rent." *Id.* at 421-22 (emphasis added). While the *Jones* case did not address specifically the question of whether racially discriminatory intent is a necessary ingredient in a case involving the Thirteenth Amendment and 42 U.S.C.

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7. CONG. GLOBE, 39th Cong., 1st Sess., 474 (1865). The bill's opponents argued that the Thirteenth Amendment should be more narrowly construed. Senator Saulsbury stated that, "The operation, the effect of that amendment [the Thirteenth] is simply to say that a person who heretofore was a slave of another shall be no longer his slave, and it operates no further. It bestows no rights further than to relieve him from the burdens of servitude and slavery. A man may be a free man and not possess the same civil rights as other men." CONG. GLOBE, 39th Cong., 1st Sess., 477 (1865).

§1982, the above-cited language seems to indicate the necessity, based upon both the congressional history and the clear language of the statute, for a showing of racial motivation in a §1982 case.

In looking at the two possible approaches, *i.e.*, the disproportionate impact test used in *Griggs v. Duke Power Co., supra,* or the test in *Washington v. Davis, supra,* and *Arlington Heights v. Metropolitan Housing Corp., supra,* it is apparent from this Court's opinion in *Davis* that there is an understandable reluctance to expand the use of the disproportionate impact test used in *Griggs* beyond those areas where it is clearly applicable by statute.

The Court in *Davis* recognized that "[u]nder Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved." 426 U.S. at 247.

The Court therein held, however, that they were not disposed to adopt the more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments to the seemingly reasonable acts of administrators and executives. The Court stated that extension of the rule beyond those areas where it was already applicable should await legislative prescription. *Id.* at 247-48.

With this reasoning in mind, petitioners urge the Court to confirm that the disproportionate impact test should not be expanded without a legislative direction to do so. Such a legislative command is certainly lacking in the case at hand. The provisions of §1982 give no indication that such a test should be applied, and, to the contrary, the legislative history of that statute indicates that a showing of racial motivation was intended by the Congress to be a necessary element.

Section 1982, extending as it does to both public and private actions involving property, might well precipitate many of the same consequences feared by the Court in *Davis* if proof of discriminatory intent is not required. As evidenced by the case now before the Court, such a test can invalidate otherwise reasonable legislation or actions of a local governing body on the sole basis that they benefit or burden one race more than another. The ramifications of this upon a local governing body, without further instructions from this Court as to what constitutes a badge of slavery under the Thirteenth Amendment and §1982, could be paralyzing. Such a standard would virtually prohibit any legitimate municipal act which has a disparate impact upon either race.

The *Arlington Heights* Approach

In *Arlington Heights v. Metropolitan Housing Corp., supra,* the Metropolitan Housing Development Corporation (MHDC), a non-profit developer, contracted to purchase a tract of land within the boundaries of the Village of Arlington Heights in order to build racially integrated, low and moderate income housing. MHDC applied to the village for the necessary rezoning. Pursuant to the application for rezoning, the Village Commission held a series of public meetings wherein the pros and cons of the rezoning were discussed. After such meetings were held, the Village Plan Commission denied the requested rezoning. MHDC and others brought suit alleging that the denial was racially discriminatory and violated the Equal Protection Clause of the Fourteenth Amendment.

The Court, in rejecting the equal protection claim, stated that:

> official action will not be held unconstitutional solely because it results in a racially disproportionate impact.

> "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Arlington Heights*, 429 U.S. at 264-65, quoting from *Washington v. Davis*, 426 U.S. at 242.

This Court in so ruling recognized that legislators and administrators, who are called upon to make such decisions, are necessarily concerned with balancing numerous competing considerations and that, as such, the courts should refrain from reviewing the merits of their decisions absent a showing of arbitrariness or irrationality.

The Court, however, reasoned that racial discrimination cannot be one of those competing considerations; therefore, when there is proof that a discriminatory purpose has been a motivating factor in that decision, such judicial deference is no longer justified.

The Court further recognized that, when dealing with decisions of local governing bodies, such a discriminatory purpose is often difficult to discern. In recognizing the difficulties involved in such a case, the Court held that a "sensitive inquiry" is necessary into any circumstantial or direct evidence of intent as may be available. Several evidentiary sources for determining the intent were mentioned: (1) the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes," (2) the specific sequence of events leading up to the challenged decision, (3) departure from the usual procedural sequence, (4) substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and (5) the legislative or administrative history, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 266-68.

Of the two tests we have discussed thus far, the one most applicable to the case now before the Court would appear to be that used in *Arlington Heights*. The types of actions taken by the Village of Arlington and the City of Memphis appear to be very similar in nature. The complaints made by the plaintiffs in each case, while relying upon different constitutional sections, appear to be alleging the same sort of discriminatory action.[8] The policy considerations involved in *Arlington Heights* for requiring a showing of more than just a disproportionate impact would appear to be identical to those present herein. As such, petitioners urge this Court to apply the same or a similar approach to the case now before it.

It is also worth noting that this was the test which was used by the District Court below in rendering its decision. Based upon this test and the inquiry suggested by *Arlington Heights*, the District Court found that there was not sufficient proof of racially discriminatory intent or purpose upon the part of the city officials to establish a constitutional violation.

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8. Petitioners feel that requiring a showing of discriminatory intent when a violation of the Thirteenth Amendment and 42 U.S.C. §1982 is alleged is consistent both with the legislative intent and the rationale in *Davis*, in not looking behind the seemingly reasonable acts of legislators and administrators. Though the Sixth Circuit Court of Appeals, in its majority opinion in *Greene v. City of Memphis*, 610 F.2d 395 (1979), seemed to indicate either that a showing of intent was not required or that intent could be inferred from a lesser showing than that suggested in *Arlington Heights*, the court went on to cite a number of cases, apparently as authority for its "badge of slavery" conclusion. 610 F.2d at 403-04, quoting from Justice Douglas' concurring opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445-46. The cases cited, though, were almost all decided upon the Fourteenth Amendment, not the Thirteenth. This indicates to petitioners that no less a showing of intent should be allowed in Thirteenth Amendment and §1982 cases than has been required by the Court when a Fourteenth Amendment violation has been alleged.

In *Palmer v. Thompson, supra,* while a main thrust of the opinion is directed to whether the action of the City of Jackson in closing public pools constituted a violation of the Equal Protection Clause, the Court once again had to battle with the concept of reviewing the actions of a local governing body which is faced with making difficult daily decisions concerning local matters.

This Court, after finding that there was "state action" in the closing of the pools and, therefore, a potentially valid cause of action under the Fourteenth Amendment, distinguished the fact situation from cases in which "whites are permitted to use public facilities while blacks are denied access" and those in which "a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities." 403 U.S. at 220.

Petitioners alleged that the reasons cited by the city council for closing the pools were spurious and that the real reason was that the council was impermissibly trying to retain some of the vestiges of segregation by refusing to operate the public pools on an integrated basis.

This Court declined to look behind the expressed motives of the legislating body, stating that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." The Court further stated that it would be "extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Id.* at 224.

In sustaining the action of the City of Jackson's closing of the city pools, the Court noted: (1) that the pools would be closed to everyone, whether black or white, and the effect of such closings would be the same upon whites and blacks; and (2) that there was substantial evidence

to support the city council's decision that the pools should be closed because they could not be operated safely or economically on an integrated basis.

Justice Burger in a concurring opinion wrote:

> To hold . . . that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that it may not be dropped [reference omitted] would plainly discourage the expansion and enlargement of needed services in the long run.
>
> . . . .
>
> We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional. *Id.* at 228.

Along this same line, it has been argued by the petitioners from the very beginning of this action that the reasoning used by this Court in *Palmer* should apply to the present case. It is certainly evident that the closing of West Drive as a through street, thereby blocking traffic from the north, prohibits whites as well as blacks from entering West Drive from the north, thereby affecting both black and white drivers equally. As such, there is no constitutional violation.

The petitioners in *Palmer* raised, in addition to the equal protection claim, the allegation of a violation of petitioners' rights under the Thirteenth Amendment. The Court restated petitioners' argument thusly:

> The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, . . . this Court should declare that the city's closing of the pools to keep the

> two races from swimming together violates the Thirteenth Amendment. *Id.* at 226.

This Court declined to extend the language of the Thirteenth Amendment to encompass the above-summarized fact situation, affirming that the framers of the Amendment did not intend such an expansive application for it, and refused to hold that the pool closings came within the definition of "badge or incident" of slavery.

Petitioners in the action now before the Court feel that the denial of access to vehicular through traffic on West Drive to black citizens and white citizens alike, after arguments for and against the street closing, after thoughtful consideration by the City Council, and through lawful proceedings of the local government, can no more be said to be a "badge or incident" of slavery than could the closing of the city pools in *Palmer*.

Land Use Decisions

In looking at the specific action taken by the City Council herein, it is apparent that it was in the nature of a land use decision. While it may be true that the closing of West Drive was not taken in response to any uniform planning effort throughout the City, as noted in the Court of Appeals majority opinion, one of the objectives of the action was to help preserve the Hein Park Subdivision as a midtown residential section. This Court has long been of the opinion that much deference should be accorded to such matters concerning land use regulations. See *Arlington County Board v. Richards*, 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

In both *Village of Belle Terre* and *Euclid*, this Court recognized that land use regulations enacted by local

governing bodies may strive to create quiet places free from disturbing noises and increased traffic, as opposed to being confined to the elimination of filth, stench, and unhealthy places. In the case now before this Court, it appears from the record that the petitioner attempted to do no more than create just such a tranquil atmosphere.

In the recent case of *Arlington County Board*, this Court further recognized the authority of a municipality to decide, as did the Memphis City Council herein, that restriction of the flow of outside traffic into particular residential areas would enhance the qualify of life there by reducing noise, traffic hazards, and litter. The Court, while recognizing that such an action would indeed discriminate against non-residents of the affected areas, held that the Constitution does not outlaw such beneficial, social, and environmental objectives, nor does it presume distinctions by the local government between residents of a local neighborhood and non-residents to be invidious.

It would appear that the objectives, both of the applicants in requesting to close West Drive and of the City Council in passing the resolution authorizing the closure, are similar to those objectives mentioned in *Arlington County Board*. It would further appear that, while the restricting of through traffic on West Drive arguably would discriminate between residents and non-residents, absent any proof of racial motivation on the part of the City Council there should be no finding of a constitutional violation.

Analysis

With the above argument in mind, petitioners urge that an approach similar to that used in *Arlington Heights*, *supra*, and applied by the District Court herein, should be applied in this case.

In so applying this test, it becomes apparent from a study of the record herein that, even if it can be said that the action taken by the City Council has a disproportionate impact on certain black citizens, which is debatable, that impact certainly is not so stark as to support an inference of a discriminatory purpose or intent. Such an inference can only be made in extreme situations, in which the disproportionate impact is "unexplainable on grounds other than race," such as those depicted in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[9]

Further, there is not sufficient proof in the record to support a holding of racially discriminatory intent or purpose on the part of city officials and thereby establish a constitutional violation, based upon the considerations suggested by *Arlington Heights, supra*. In the case at bar, neither the historical background of this decision nor

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9. The case presently before the Court is clearly distinguishable from *Yick Wo v. Hopkins* and *Gomillion v. Lightfoot*.

In *Yick Wo* the Court found that a racially neutral city ordinance requiring that laundries be operated only in buildings of brick or stone, except where special permission had been granted by the board of supervisors, had been applied discriminatorily, in that all of the city's Chinese laundry-owners who had petitioned, approximately 200 of them, and only one non-Chinese had been denied permission to continue operating their businesses in wooden buildings.

The Court found these facts so patently discriminatorily motivated that it felt that racial motivation was as much as admitted by the defendant. Defendants offered "[n]o reason whatever, except the will of the supervisors," for the disparate treatment.

In *Gomillion* the Court held that the lower court's granting of a motion to dismiss for failure to state a claim was unwarranted. From plaintiffs' allegations of discrimination and the fact that the defendants had transformed the boundaries of the city from a square into an "uncouth twenty-eight-sided figure," thereby resulting in the removal from the city of all but four or five of its 400 black voters and none of its white voters, the Court found that plaintiffs had stated a claim that, *if "uncontradicted or unqualified,"* (emphasis added) would almost necessitate a finding of discriminatory intent.

the specific sequence of events leading up to the challenged decision lend any support to a finding of racial intent.

From the recorded transcripts of the several public hearings before the City Council concerning the proposed street closing, it is apparent that the matter was openly debated and thoughtfully considered on its merits. There is no evidence of the Council's having any racial purposes in closing the street. A reading of the record further shows that the Council's main concern was over the effect this closure would have on traffic, both along West Drive and in the surrounding area.

The evidence clearly indicates that the street and alley closing procedure had been used to close alleys and dedicated but unused streets for the benefit of black citizens as well as white citizens. While the proof shows that the closing of West Drive was the only instance in which the street and alley closing procedure had been used to close a street which had served as a thoroughfare for residents and the public, that fact, without more, should not constitute proof of racially discriminatory intent.

It should further be stressed that the closing of West Drive was at its northern end, not because it represented the precise point of a separation between two neighborhoods, as suggested by the Court of Appeals in its majority opinion, but because that is the point where a major four-lane thoroughfare funnels into a two-lane residential street.

CONCLUSION

From such an analysis, it is apparent that there can be no finding of an intent or purpose to racially discriminate based upon the *Arlington Heights* approach. As such, petitioners request this Court to reverse the decision of the Court of Appeals and affirm the holding of the District Court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS, AND EDWIN McBRAYER

Petitioners,

VS.

N.T. GREENE, ELNORA PRIEST CROSS, EDWIN OWENS, AND CAROLYN BURSE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT GREENE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS,
AND EDWIN McBRAYER

Petitioners,

vs.

N.T. GREENE, ELNORA PRIEST CROSS,
EDWIN OWENS, AND CAROLYN BURSE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT GREENE

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a municipality's action in closing to through traffic a major street, through an all-white community, which provides the sole direct pedestrian and vehicular access to a public park and public schools from a predominantly Black community, constitutes a violation of 42 U.S.C. § 1982 and the Thirteenth Amendment of the United States Constitution, when the municipality's action in closing the street had a racially disproportionate adverse impact on Black property owners and affected them psychologically when the closing

benefited whites and was not done pursuant to a city-wide plan and the procedure used was irrational and arbitrary.

2. Whether this Court should give a broad interpretation to 42 U.S.C. 1982 and the Thirteenth Amendment in determining what are "badges and incidents of slavery" when the legislative intent of the Congress was to give practical meaning to emancipation and the scope of 1982 is limited.

3. This Court should affirm the opinion of the Appellate Court and not reach the issue of intent or purpose since the constitutional question is not necessary for the disposition of the exact issue before this Court.

COUNTER-STATEMENT OF THE FACTS

In their statement of the case, Petitioners have supplanted the true facts in this record with a wholly one-sided presentation and have omitted important facts which will aid this Court in reviewing this case properly. Respondent Greene, accordingly, presents this counter-statement of the facts.

Hein Park is an all-white subdivision located in the heart of Memphis, Tennessee. It was developed well before World War II as an exclusive residential neighborhood for white citizens and those characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for *a large park and zoo*, (emphasis added) the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision,

which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of Black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive. (A. 148).

There were five years of study and planning put into the closing of West Drive by its all-white residents of Hein Park. (A. 10).

Mr. Robert Fosnaugh, the traffic engineer, had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets to the subdivision. Apparently, he changed his mind when they agreed on a plan more to his liking. Mr. Fosnaugh advised that "from a practical standpoint — it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby, achieving most of the original objectives of the proposal." (A. 152). It should be noted that the District Court stated, "I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years, the Hein Park Civic Club. They tried to keep all of the people north of Jackson Avenue from coming through there and that didn't work. So, now somebody, I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to - I would be interested to know who is going to pay the eight hundred dollars (the agreed price of the 25-foot strip across West Drive). If we can get those two people to agree and lend us their names, we can stop these people to the north. The people from the north were predominently Black people. (A. 174)."

Bill C. Weber, M.D., advised the Planning Commission that in August 1970, a petition to close several streets in

Hein Park was submitted to the City of Memphis Traffic Engineering Department but this proposal was rejected.

Based upon the information given Dr. Weber by City Engineer Robert A. Fosnaugh, that recommendation and advise was accepted and put into the July 9, 1973 application. Dr. Weber stated that the Hein Park Civic Association had discussed this matter with designated agencies, representatives and their comments concerning the closure were noted. (A. 132-145).

On July 9, 1973, a formal application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association for the closing of a portion of a public residential street known as West Drive. The application states that the reasons for the requested closure are to:

1. Reduce flow of through traffic using subdivision streets,
2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School,
3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interruption (sic) of community living. (A. 135; Trial Exhibit Transcript, pp. 19, 148).

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government in an attempt to discern their feelings regarding the closure. One of the senior planners who worked on this application (Pauline B. Temple, Deputy Comptroller Council Records) was a patient of the prime mover behind the closing of the street. (Dr. Bill C. Weber, Street Project Chairman) and yet this employee did not disqualify himself (sic) from processing this petition. (A. 102, 126-128; Tr. Ex. 1 & 2; A. 130-131; Tr. Ex. 4; A. 132-145; Tr. Ex. 13).

After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regu-

lar meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (A. 130, Pet. Br. 8).

Mr. Paul Goldstein, a planning assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closing and making a field study of the area under scrutiny. (A. 156). The Planning Commission on November 1, 1973, approved the closing of West Drive and the matter did not come on for hearing before the Memphis City Council until January 29, 1974. Affected area residents were not given any notice of the closure recommendation nor were they included in Mr. Goldstein's survey of the area under scrutiny, the exception being the all-white residents of Hein Park. (A. 8-10; A. 103-105) (Tr.). Even though the Black residents north of West Drive were not given notice as to the proceedings, a white resident of West Drive, Ms. Sarah Terry, objected to the closing and stated that the "person who was passing out the petition wanted to eliminate "undesirable traffic"." (A. 114-115; Tr. 140).

Nevertheless, the matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of a resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing. Each side was given fifteen minutes to present its views, though the Hein Park group had been working with the City and independently on proposals to close the street for five years, notwithstanding. (A. 10, 132; 174; Tr. Ex. 26; Tr. 19).

It was alleged in the record by Respondent Green that approximately 50 people who live north of Jackson Avenue attended the council meeting. Nevertheless, the council allowed equal time to both groups (15 minutes per side) (A. 9).

The record reveals that the following comments were made by persons who opposed the closing of West Drive. In summary:

(a) *Mrs. Sarah Terry*, (a white resident of West Drive) said she used the Jackson Avenue - West Drive entrance "daily", and was told by a member of the Planning Commission staff, that they had to have 100% approval by the residents of West Drive. She feels West Drive is a public street and the residents could not "dictate" who may or may not use the street. That West Drive is definitely a convenient road for people coming south on Springdale. That West Drive is the only through street between University and Trezevant. That as far as safety of children is concerned, that is the responsibility of parents. That to close West Drive would simply re-route other traffic from within Hein Park to that of another street within Hein Park.

(b) *Mrs. Vicki Vincent* (white, of the Vollintine-Evergreen Community Action Association) stated there were two residents, who live on West Drive, who opposed the closing (the Terry family and the Thomas family). She said speed breakers would be a deterrent to through traffic and sidewalks could provide safety for children and elderly residents. That to close the street would set a "dangerous precedent". That when this matter was initially brought before the Planning Commission (4th day of October, 1973), it was rejected. That if West Drive was closed the VECAA fears the Council will be opening up a "giant can of worms". That citizens from Red Acres to Parkway Village, from Chickasaw Gardens to Central Gardens will want the same thing. That people all over the City will want the same thing.

(c) *Mr. Calvin Woods, Jr.* (a Black resident of East Drive) stated West Drive is a public street built and maintained by all of your tax money. That the residents of West Drive should be made to build public sidewalks just as he was made to do in the front of his house.

(d) *Mr. Emanual Goldberger* (a white resident of Barbara Drive) said he was against the closing because it is the only place that has a traffic light that leads us out of our part, north of Jackson between Springdale and Hollywood. That the children on East Drive, Trezevant, and Barbara Drive are just as dear to their parents as the children in Hein Park. That the Council should build a park in the area for the children to play in.

(e) *Mr. Henry Jackson* (a Black, representing Shankman Hill Civic Group) stated he and others paid a great deal of taxes. That the "speed breakers" will cause mass confusion with the intersection (some cars trying to make turns and others going through Hein Park). He remarked, "I believe that the law applies to everybody equal." There would be no accidents if sidewalks were put in.

(f) *Rev. Cummings* (a Black resident of Springdale and Alameda) stated if a sidewalk was needed on West Drive, then the Council should authorize it, but not close West Drive.

(g) *Plaintiff-Respondent Greene* (Black) stated Hein Park residents had continuously, since the 1940's, "waived the law", in so far as public sidewalks are required in residential areas, for their own benefit. That now the Hein Park residents want West Drive closed. That taxpayers' money build and maintained West Drive all these years, and taxpayers' money will continue to maintain West Drive. That he had talked to State Rep. Doyle Daniels, who opposed the closing of West Drive. That to close West Drive will set a dangerous precedent.

(A. 12-14).

Alternatives to the West Drive closing were discussed by the Council members. Some thought that the problem was one simply of traffic and speed and that speed breakers were the only thing necessary. Councilman Ford (Black) pointed out that speed breakers could not be located on a "dedicated street" and could only be put on private property. Mr. Ford further recommended a speed of 20 m.p.h. and radar units to patrol the neighborhood.

Councilman Allissandratos (white) stated, we have closed alleys in the past, but that West Drive is not an "alley". He had information that the Police Department thought the closing could cause disruption of police services in the area.

Mr. Clay Hiddleston (Chief Administrative Officer of the Mayor's Office) testified 820 cars passed through West Drive in a 12-hour period. Councilman James (white Hein Park District) suggested a compromise by putting a 15-mile speed limit on West Drive. Mr. Woods (a Black resident of the area) spoke up and said that he was going to tell it like it is, "They don't want the Black people in there no way. That's the way it is." Mr. Woods further said, "I doubt if a hundred cars go through there during the day between 7:00 or 6:30 till 9:00. There may be that many cars, maybe 200." The Council then voted on the resolution, 8-3 in favor, thereof. (A. 14-15, 126; Tr. Ex. 1 & 2; Tr. 19).

Later Councilman Bob James informed Plaintiff on the 30th day of January, 1974, that Councilman Allissandratos would ask the whole Council to reconsider the closing of West Drive at its next meeting on February 5, 1974. Chairman McBrayer (white) of the Council would not allow further discussion by Respondent Greene and members of his class stating that their rights to a "public hearing" had already been fulfilled. The Council refused to accept 742 signatures on petitions against the resolution authorizing the closing of West Drive. On the reconsideration motion, the vote was 7 for and 5 against. (A. 15-16).

Councilman Ford attempted to put a new resolution on the agenda to reopen West Drive on February 26, 1974 and on March 5, 1974 but the former session did not take place and the latter attempt was defeated on a 6 to 4 vote. (A. 16).

On the printed fact of the application, it is provided that "all owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the procedure for filing street or alley closing and includes this same requirement. All of the owners on West Drive whose property physically touches West Drive did not sign the application. (A. 149-150). Mrs. Terry stated that a member of the Planning Commission staff told her that 100% approval by the residents of West Drive was needed for closure. (A. 12).

Mr. Miller, of the Planning Commission, stated, "I interpret abutting to be immediate adjacent to the land that we are going to close. The portion of the street that we are going to close." (A. 118).

Mr. Goldstein, a planning assistant, claimed that a document entitled "West Drive Street Closure" contained in the file, was not an official document of the Planning Commission. The document states in part on Page 2 No. 4, "As required of the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are hand-written above and the typewritten word "affected" which has been crossed out. (A. 156).

In two cases, one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic. The applications, made in 1968 and 1972, respectively, contains the signatures of all persons who abut along the portions of streets which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are Black neighborhoods. (A. 158).

Respondent Greene and intervenors were credited with the provision of other facts that the District Court found as recited by the Court of Appeals:

> The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited Black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the Black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain Black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." (A. 171-172).

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound, overwhelmingly, Black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return. (A. 172).

While ruling against the Plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

> "In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening

> the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the Black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and inconvenience and delay to Sanitation Department employees."

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the Black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars (the agreed price of the 25-foot strip across West

Drive). If we get those two people to agree and lend us their names, we can stop these people on the north.[1]

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police."[2] The trial judge additionally relied in his findings

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[1]The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just —

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) black?

MR. SPEROS: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that this is one of the areas that — we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

[2]Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most improtant things that I think will occur is an increase in

(continued)

(footnote continued from preceding page)
hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harassment (sic) on the part of the children in the community that attended Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favoritism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and in the area, particularly in Hein Park.

Q So that you are not restricted - Well, let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area.

A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the City of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably bring about an increase in arrests and harassment (sic) or more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.

* * * * * * *

. . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

upon the testimony of Plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area", his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it (the street closing), would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future. (A. 173-176).

West Drive and the Hein Park residents do not have sidewalks in front of their property. (A. 14, 72-73).

A Black resident, Calvin Woods, Jr., of East Drive, stated that he was made to build a public sidewalk in front of his house. (A. 13).

West Drive leads almost directly to the only entrance to Overton Park on its north side. (A. 122, 154).

SUMMARY OF ARGUMENT

This Court is being asked to determine whether purposeful discrimination should be required to establish a violation of

42 U.S.C. § 1982 and the Thirteenth Amendment without regard to who the victims are, what the activity is or what fundamental or basic right is involved. This approach ignores the Reconstruction Congress' concern with securing for recently emancipated Blacks the status of citizenship and the basic rights appurtenant thereto.[3] This Court in *Runyon*

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[3]Heated Congressional debate occurred before the first sentence of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1966), was amended so as to declare explicitly and unequivocally that Negroes are citizens. One Senator voiced the opinion that the Thirteenth Amendment had removed "the only obstacle in the way of citizenship" and that they had thus become citizens automatically, although he acknowledged the difficulties presented for that argument by the Supreme Court's Dred Scott decision, *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1956), in which the Court held that the framers had not intended broadly phrased constitutional provisions to include Negroes. *See* 36 CONG. BLOBE 506-07 (1866) (remarks of Sen. Johnson). But the vast majority of Congressmen assumed that Negroes were not citizens. *See, e.g., id.* 497-98 (remarks of Sen. Van Winkle). Furthermore, several legislators contended that Congress did not possess the power to make Negroes citizens ad that a specific constitutional amendment was necessary. *See, e.g., id.* 499 (remarks of Sen. Cowan) (the Thirteenth Amendment empowered Congress to legislate only to enforce the liberation of the slaves and no more); *id.* 523-24 (remarks of Sen. Davis) (the congressional power to make persons citizens by naturalization applies only to persons formerly foreigners who renounce allegiance to a foreign power; it does not apply to non-citizens who have no prior foreign allegiance).

The very basic nature of S.61, 39th Cong., 1st Sess. (1866), the bill that became the 1866 Act, is illustrated by the comments of the bill's sponsor, Senator Trumbull, and its most outspoken opponent, Senator Davis. Senator Trumbull characterized the bill as "the most important measure . . . since the . . . constitutional amendment abolishing slavery." He stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding

(continued)

v. McCrary, 427 U.S. 160 (1975), interpreting *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), held that:

> "The portion of § 1 of the Civil Rights Act of 1968 presently codified as 42 U.S.C. § 1982 [42 U.S.C.S. § 1982] prohibits private racial discrimination in the sale or rental of real or personal property. Relying on the legislative history of § 1, from which both § 1981 and § 1982 derive, the Court concluded that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property," 392 U.S., at 437. and that this prohibition was within Congress' power under § 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." Id., at 427 U.S. at 170."

The Court held further in *Runyon v. McCrary,* again interpreting *Jones* and stated that:

> "The applicability of the holding in *Jones* to § 1981 was confirmed by this Court's decisions in *Tillman v. Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973) and *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975). In *Tillman* the petitioners urged that a private swimming club had violated 42 U.S.C. § § 1981, 1982, and 2000a et. seq. [42 U.S.C.S. § § 1981, 1982, and 2000 a et. seq.], by enforcing a guest policy that discriminated against Negroes. The

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(footnote continued from preceding page)

States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

It is the intention of this bill to secure those rights.

36 CONG. GLOBE 474 (1866). The fundamental character of the rights in question is apparent in light of the attacks levelled by Senator Davis. He contended that "the whole subject of free Negroes and of slave Negroes" was constitutionally the province of the states. *Id.* at 530. He stated that "[t]his is a Government and a political organization by white people. It is a principle of that Government and that organization before and below the Constitution, that nobody but white people are or can be parties to it." *Id.* He contended that the power to amend the Constitution did not include within it the "power to revolutionize," to "subvert" and to "change our form of Government" by making Negroes citizens.

> Court noted that "[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c 31, § 1, 14 Stat 27." 410 U.S. at 439. Referring to its earlier rejection of the respondents' contention that Wheaton-Haven was exempt from § 1982 under the private-club exception of the Civil Rights Act of 1964, the Court concluded: "In light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." 427 U.S. at 171."

This Court should interpret § 1982 in light of the altered circumstances and use a broad reading to reach vestiges of slavery from whatever source they derive. There can be no doubt that the Reconstruction Congress was concerned with the eradication of the badges and incidents of slavery. The forms have changed but the problems remain and this Court, as final arbiter of citizens' rights, should not subvert the plain meaning of the statute and its remedial effects.

This Court breathed new life into § 1982 in *Jones, supra.* Now, this Court is being asked to throw up a shield that would no doubt leave many violations of rights unremedied. This obstruction takes the form of an evidentiary method which requires intent and/or purpose to discriminate before one can prove his case under § 1982. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), this Court expanded the deprivation of rights that could be traced to slavery. The holding that poor performance by Blacks on standardized intelligence tests and the lower percentile of Blacks with high school diplomas[4] can be linked to slavery and its pernicious after-effects on the educational opportunities available to Blacks[5] was indeed a correct decision and it raised the legitimate aspirations of the Black and poor in this country.

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[4]401 U.S. at 425-426.

[5]*Id.* at 430.

This concept was judicially engrafted into the act as an evidentiary method of achieving the purpose of Congress - which was to eliminate the "artificial, arbitrary and unnecessary" barriers of employment.[6] Clearly, there is no reason this same approach should not be used to effectuate the congressional purpose underlying Section 1982. After all, universal freedom in these United States has not been achieved as of this date.

Respondent is aware of this Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979) and *City of Mobile v. Bolden,* 100 S.Ct. 1490 (1980), but believes that this Court need not decide the issue of purpose and/or intent in this case. This is so because the 13th Amendment has had a limited construction and thus, the concerns expressed by this Court that "application of a disproportionate impact standard under the Equal Protection Clause would be far reaching and would raise serious questions about and perhaps invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes"[7] should be balanced with the need to eradicate the vestiges of slavery that still exist in this country. Many practices that carry forth the vestiges of slavery are not intentionally designed, but the critical focus should be on the effect of the act complained of, not the motive of the actor. This Court should look to the act complained of to see whether it adversely prejudices a discrete group of people in the enjoyment of important rights without sufficient legitimate justification. This means that the Court should take into consideration the relative position

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[6]401 U.S. at 431.

[7]426 U.S. 229, 248 (1976).

of the affected group, which will often determine the degree and the kind of injury that results from the particular action. This approach is consistent with the "totality of the circumstances"[8] articulated in *Washington v. Davis, supra.*

In the instant case, there was a street closing that not only affected Black pedestrians and vehicular access to West Drive, to Overton Park and to a public school but it did more. The closing inhibited Blacks fom holding their property equal to whites. Moreover, the closure denied Blacks their right to uphold their property in the same manner as whites. Obviously, if a white person buys property in Hein Park, he will have direct access to Overton Park and the public school. If a Black person buys property across the street he would not have direct access and could not enjoy the same rights, privileges and amenities as whites because the barricade inhibits his access. If one took into consideration the passing of the resolution by the municipality above, one might be able to conclude that the action was constitutionally permissible. Nevertheless, when one views the whole sequence of events, it becomes apparent that the action of the municipality cannot withstand judicial review.

This Court should affirm the Appellate Court's opinion and not reach the question of intent and/or purpose because this case can be decided without breaking new ground. In the alternative, this Court should, at a minimum, issue a remand on the pendent state court claims and the "due process and equal protection" claims.

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[8]Discriminatory intent could be inferred from the grossly disproportionate impact of official actions; the historical background of the decision, "particularly if it reveals a series of official actions taken for inviduous purposes"; "the specific sequence of events leading up to the challenged action," particularly departures from substantive and procedural norms; and legislative or administrative history, "especially where there are contemporary statements by members of the decision-making body, minutes of its meetings or reports." 426 U.S. at 266-68.

ARGUMENT

INTRODUCTION

Petitioners are attempting to have this Court to reverse a decision of the Appellate Court regarding a street closing in Memphis, Tennessee. They would have this Court believe this action was "a municipality's exercise of its police powers in closing this street to through traffic in order to achieve a residential area permissible goals of reducing the flow of traffic, enhancing safety and reducing noise and litter." (Pet. Br. at 4). In order for the Court to gain more appreciation for this case, the Court need not look any further than its decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). In that case this Court said:

> "Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway, will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed." 401 U.S. at 406.

Overton Park is a very beautiful park with various facilities, open for all to enjoy. Among the public facilities in Overton Park are:

(a) *The Shell* - an outdoor stadium that seats hundreds of persons. All types of performers and artist perform there and many of the performances at the Shell are free to the public.

(b) *The Children's Playground* - a playground for children with different kinds of children's swings, monkey bars, slides, iron horses and many other attractions.

(c) *The Overton Park Zoo* - one of the largest facilities of its kind in this region.

(d) *The Aquarium* - is an extension of the Zoo which houses among other aquatic life, snakes and other species of animals.

(e) *Brooks Memorial Art Gallery* - is an art gallery located in Overton Park.

(f) *The Memphis Arts Academy* - is another facility which is housed in Overton Park.

(g) *The Golf Course* - is a nine-hole facility which is located in Overton Park.

(h) *Softball Fields* - are located in Overton Park.

(i) *Children's Wading Pool* - is a wading pool in Overton Park which is adjacent to the children's playground.

The above-mentioned items are only a few attractions located in a vast green haven called Overton Park. In the *Overton Park* case the Court said:

> "The Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . That congressional command shall not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this nation that the beauty and health-giving facilities of our parks not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a cabinet officer - the Secretary of Transportation. (J. Black and Brennan Separate Opinion). 401 U.S. at 421."

Contrary to the contentions of Petitioners, this case is not an ordinary land use case. This case concerns itself with, among other things, access of Black youth and others to

Overton Park and Snowden Public School. Petitioners' brief is silent on the issue of Overton Park and Snowden School for several reasons. Historically, the residents of Hein Park and the City of Memphis have attempted to keep Blacks from enjoying Overton Park. (A. 12-15, 154; Tr. Ex. 1 & 2). Moreover, the City has actively participated in this scheme by enforcing its sidewalk laws against other residents but not the Hein park residents and failing to afford the effected area residents substantial and procedural due process in the street closing. (Res. Br., pp. 3-9 herein).

This case is similar to *Jennings v. Patterson,* 488 F.2d 436 (1974), where a barricade was erected by two private defendants, which Defendants City of Dadeville, Alabama and its government officers failed to remove. In reversing the District Court's decision, the Court stated:

> "Yet it was shown at trial that, with one exception, all of the persons directly affected by the Patterson's barricade were black. The only white person affected, Shaddix, was offered private access to the closed street. And the jury found that the defendants had knowingly deprived these persons of the right to use the street. Clearly, these persons, because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens. *See Jones v. Mayer Co.,* 392 U.S. 409 (1968). 488 at 442.

It should be noted that the Court, in *Jennings,* stated quite clearly that "the construction of the barricade was a deprivation of the rights secured to them (Blacks) under 42 U.S.C. §1982 and the denial of convenient access to downtown Dadeville was an injury to plaintiffs' property." Here, the same rationale applies and this Court should affirm the Court of Appeals' decision. The discrimination in this case is as stark as it was in *Hawkins v. Shaw,* 437 F.2d 1286 (1971) where the Court said "the Town of Shaw, indeed any town, is not immune to the mandates of the Constitution."

The Fifth Circuit stated in a per curiam opinion in Shaw II:

> "Moreover, in our judgment the facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an intentional and purposeful disregard of the principle of equal protection of the laws. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Loving v. Virginia,* 388 U.S. 1, 10 (1966); *Snowden v. Hughes,* 321 U.S. 1, 8; *Kennedy Park Homes Association, Inc. v. City of Lackawanna,* 436 F.2d 108 (1971); *Rodriquez v. Brown,* 5 Cir. 1970, 429 F.2d 269, 273; *Norwalk CORE v. Norwalk Redevelopment Agency, supra* 395 F.2d 931."
>
> Federal Courts are reluctant to enter the field of local government operations. The conduct of municipal affairs is "an extremely awkward vehicle to manage." It is apparent from our original opinion, and we repeat here, that we do not imply or suggest that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record."

Here, we are only dealing with the City of Memphis, Tennessee and the street closing and we respectfully request the Court to distinguish and limit this case to the facts herein and affirm the decision below.

THE CIVIL RIGHTS ACT OF 1866 AND THE STANDARD THAT SHOULD BE USED BY THIS COURT

In *Jones, supra,* the Supreme Court took judicial notice of the Fair Housing Act, (Title VIII of the Civil Rights Act of 1968)[9] passage. This Court said that "1982 contained none

[9]42 U.S.C. 3601-3619 (1970).

of the exemptions that Congress excluded in the Civil Rights Act of 1968." Indeed, the Court made clear that the rights created by 1982 are independent of and not limited by the passage of the more detailed provisions of Title VII and Title VIII.[10]

Professor Robert G. Schwemm, in his article "Discriminatory Effect and the Fair Housing Act", 54 Notre Dame Lawyer 199 (1978) urges a standard for 1982 that tracks the yet developed standard of the Housing Act of 1968 (Title VIII). Respondent urges this Court to accept this standard. Professor Schwemm states:

> "These differences in Title VIII and § 1982 make it at least conceivable that the standard of proof under the two statutes could also vary. As in the case of Title VIII, there would seem to be three possible standards under § 1982: (1) discriminatory purpose, as required for equal protection claims by *Washington v. Davis*; (2) unjustified discriminatory effect, as applied to title VII cases by *Griggs;* and (3) something else, perhaps an intermediate standard.
>
> For its part, the Supreme Court has yet to declare whether a showing of discriminatory effect would be sufficient to establish a § 1982 violation. The Court's modern § 1982 cases have all dealt with intentional discrimination,[11] and it has not had occasion to comment on the proper standard in an effect case under the old law.[12] There is a clue, however, in *Washington v. Davis*.[13] There, the Court applied the *Griggs* standards to a § 1981 claim, albeit an unsuccessful one.[14] Since the Court has elsewhere indicated that

[10]392 U.S. at 416-17 n. 2.

[11]*See* 410 U.S. 431; 396 U.S. 229; 392 U.S. 409.

[12]Justice Stewart's opinion in *Jones* did state that § 1982 "must encompass every racially motivated refusal to sell or rent" (392 U.S. at 421-22), but nothing was said about practices with discriminatory effects that were not racially motivated. *See* note 172 *supra*.

[13]426 U.S. 229 (1976).

[14]*Id.* at 248-52.

§1981 and §1982 should be interpreted in a like manner,[15] *Davis* suggests that the proper standard under §1982 should also be derived from *Griggs*.

Perhaps the strongest argument in favor of an effect test for §1982 cases is that clarity and simplicity would best be served if the same standard applied in similar suits under Title VIII and §1982. (This argument, of course, presupposes that *Griggs* is ultimately extended to Title VIII.) The overlapping relationship of the two statutes is confusing enough without having two different standards apply in a given type of housing discrimination case. Admittedly, the desire to avoid conflicting guidelines did not prevent the Supreme Court from developing a two-standard approach in *Davis*, but the rationale for that approach—that it is up to Congress to provide for a more rigorous standard than the constitutional one of purposeful discrimination—does not apply when the comparison is between two statutes. Here, the question simply becomes a matter of congressional intent.

Doubtless the Congress that passed the 1866 law was primarily concerned with the most egregious forms of intentional discrimination and never even considered the purpose-or-effect issue.[16] Nevertheless, it is clear that the Reconstruction Congress sought to establish "a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."[17] The Civil Rights Act of 1866 was intended to abolish the "badges and incidents of slavery."[18] In *Jones*, the Supreme Court held that private racial discrimination in housing is one

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[15]*See* 427 U.S. at 171-72; 410 U.S. at 439-40. *See also id.* at 190 (Stevens, J., concurring); [I]t would be most incongruous to give these two sections a fundamentally different construction.

[16]*See* Note, *Racially Disproportionate Impact of Racially Neutral Practices - What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267, 1278-80 (1977).

[17]427 U.S. at 296. *See also* Note, *supra* note 238, at 1278, 1284-87.

[18]392 U.S. at 439-41; *See* Civil Rights Cases, 109 U.S. 3, 20-22 (1883).

of the badges and incidents of slavery intended to be eradicated by § 1982.[19] After *Jones,* it is not a big step to conclude that a housing practice that has the effect of discriminating against blacks "too is a relic of slavery."[20]

The Supreme Court has already held that the congression concerns underlying § 1982 were similar to those that gave rise to the Fair Housing Act. For example, Title VIII was intended "to replace the ghettos by truly integrated and balanced living patterns,"[21] while § 1982 was concerned with "racial discrimination [that] herds men into ghettos and makes their ability to buy property turn on the color of their skin. . ."[22] The Court has also noted that a "narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded" by it,[23] while describing the language of Title VIII as "broad and inclusive" and entitled to a "generous construction."[24]

An argument might be made that the Fair Housing Act should be governed by a more rigorous standard than § 1982, because exemptions and limitations in the newer law reflect a congressional desire to apply a more lenient test in those cases excluded from its coverage. There are two problems with this argument. First, its rationale would also justify reading the Title VIII limitations into § 1982, which the courts have already held to be inappropriate. Second, an effect standard would probably not be of much practical significance unless Title VIII also applied. A § 1982 case against an individual homeowner or small landlord who is not covered by Title VIII[25] would almost surely have to be

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[19]392 U.S. at 438-41.

[20]*Id.* at 443.

[21]409 U.S. at 211 (quoting 114 CONG. REC. 2706, 3422 (1968)).

[22]392 U.S. at 442-43.

[23]396 U.S. at 238.

[24]246 U.S. at 209, 212.

[25]*See* 42 U.S.C. § 3603(b) (1970).

based on purposeful discrimination, not just effect, because proving discriminatory effect requires a large defendant who has made a sufficient number of decisions to establish a statistically significant pattern. Similarly, the greater availability of punitive damages under § 1982 would be relevant only in cases where racial intent is shown. Thus, it is unlikely that applying a discriminatory effect standard to § 1982 as well as to the Fair Housing Act would result in imposing liability on any defendant who would not also be held liable under Title VIII.

Before the Supreme Court decided *Davis*, the lower courts certainly made no attempt to devise or apply a different standard of proof under § 1982 than under Title VIII. No distinction was made between the two in suits brought under both statutes,[26] and where § 1982 alone was involved, it was held to proscribe more than just intentional discrimination.[27]

After *Davis*, however, there have been a number of lower court decisions distinguishing between the Title VIII and § 1982 standards and indicating that proof of racial intent is required in a § 1982 case.[28] Most of these decisions simply assume that the old statute must be governed by *Davis'* interpretation of the equal protection standard, which is rather surprising since § 1982 was not enacted pursuant to the Fourteenth Amendment[29] and since *Davis* itself shows that suits against government defendants are to be judged by a more rigorous standard under § 1981 than under the

[26] *See, e.g.*, 499 F.2d 819; *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972).

[27] *See, e.g., Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). *But see McCrary v. Runyon*, 515 F.2d 1082, 1088 (4th Cir. 1975) (en banc), *aff'd*, 427 U.S. 160 (1976).

[28] *E.g.*, 429 F. Supp. at 1385; 425 F. Supp. at 1024; *cf. Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 143 n.4 (N.D. Ill. 1977); cases cited at Note, *supra* note 238, at 1280 n.76.

[29] 392 U.S. 409.

> Equal Protection Clause. These courts have also failed to analyze the legislative history or congressional purposes behind § 1982, which, as shown above, could well support an effect test in § 1982 cases.[30] Thus, their conclusion that purposeful discrimination is required under § 1982 is not based on a proper analysis of the statute and is therefore unlikely to be the final word on the matter."[31]

It has been stated by some scholars that:

> "The use of the disproportionate impact standard for sections 1981 and 1982 is permissible under the broad language of those statutes and is desirable as a method of effectuating the underlying congressional purpose. In those cases dealing with matters outside of the employment area the courts will have to alter the *Griggs* job relatedness defense to fit the particular situation. The defendant's burden in these instances should be to prove that the challenged practice is reasonably necessary for the achievement of legitimate, non-discriminatory purpose."[32]

Respondent Greene urges this Court to defer ruling on the standard at this time until a sufficient body of law is developed in the housing area. The Court should consider a case-by-case approach to 1982. If the 13th Amendment is to be what its originators wished it to be, it should be flexible in its application. To define, it at this time is to limit its operation. The amendment should be allowed to grow until universal freedom is achieved in this country. In the

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[30]*See* Note, *supra* note 238, at 1278, 1282, 1285-87.

[31]*See* Note, *supra* note 238, at 1269, 1280-84, 1288; *cf.* Note, Section 1981 and the Thirteenth Amendment After *Runyon v. McCrary - On the Doorsteps of Discriminatory Private Clubs,* 29 Stan. L. Rev. 747, 772 (1977).

[32]Racially Disproportionate Impact of Racially Neutral Practices - What approach under 42 U.S.C. Sections 1981 and 1982? 1977 Duke L.J. 1267.

meantime, this Court could and we urge that it look and see "whose ox is gored when assessing legislation or other official action under the Equal Protection Clause, if this approach is to be adopted."

As Judge Skelly Wright states, "To accurately judge effect, we must know who is the victim and to what class he belongs. The obvious fact is that the same conduct will have very different consequences depending on which group is adversely affected."[33]

A SENSITIVE INQUIRY INTO THE FACTS OF THIS CASE MANDATES AFFIRMANCE

Justice Stevens, concurring in *Washington, supra,* noted that the burden of proving discriminatory intent involves different evidentiary considerations depending on the context in which the alleged discrimination arises.[34]

The specific circumstances in which evidence of discriminatory effect is sufficient to establish an equal protection violation without direct evidence of discriminatory intent has not been clearly defined. We urge this Court to accept this case as a classic example of inferred discriminatory intent. There was both direct and circumstantial evidence introduced in this case. In *Arlington Heights, supra,* the Court further explained *Washington v. Davis* by stating that:

> "*Davis* did not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.
>
> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision

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[33]J. Skelly Wright, Judicial Review and the Equal Protection Clause, 1980 Harvard Civil Rights L.R. Vol. 15, No. 1.

[34]426 U.S. at 253 (Steven, J. concurring).

> motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from viewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." 429 U.S. at 265-266.

Respondents showed that the impact of the street closing fell more heavily on Blacks than whites. Respondents showed that a clear pattern, unexplainable on grounds other than race, emerged from the City of Memphis' action in historically not enforcing the sidewalk law against the Hein Park all-white residents while enforcing it against other residents including Mr. Calvin Woods. (A. 13-15).

Historically, Hein Park was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained as the trial judge so found. (We request this Court to interpret maintained to mean by the City of Memphis). The specific sequence of events leading up to the challenged decision was revealed in the cloak of secrecy surrounding the proposed closure, the lack of public hearings as such, the due process issues regarding notice, opportuntiy to be heard and the refusal to reopen the street closure issue by the City Council. Departure from the normal procedural sequence is glaring since the interpretation of abutting landowners was changed, the requirement of 100% approval was altered, alternative methods of reaching the same results were not seriously considered and no official survey was made as to the impact of the closing and/or whether closing was warranted under the circumstances stated by Hein Park residents. It should be noted in this regard that "what were official files and what

were not official files became an issue." (A. 156). Finally, Black residents were required to sign the 1968 and 1972 application of Benton and Ruth Streets. (1. 158).

The administrative and legislative history shows clearly that all Black Councilmen and several whites were opposed to the closing.[35]

The sensitive inquiry shows clear that the street closing perpetuated the all-white nature of Hein Park. The undesirable traffic did not pertain to vehicular traffic. This street closing was the first major street closing in the history of Memphis. Even assuming that the initial attempt to utilize procedures prescribed by law for closing a street does not in and of itself constitute circumstantial proof of racial bias, the inquiry does not stop there. Obviously, the same procedures applicable to unused streets and alleys cannot be used for a major thoroughfare. Moreover, when one looks at the due process, both substantively and procedurally, the inference is unescapable. Discrimination was the motive, purpose and reason for its use. There is no way in the world that this matter would have happened if the Springdale area was predominently white.

Respondent urges this Court to look at the totality of the circumstances in making its determination on the issue.

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[35]It should be noted that Councilman Bob James, whose district includes Hein Park, stated at the January 29, 1974 hearing that the closing of West Drive was wrong and unconstitutional. (Tr. Ex. 1 & 2; Tr. 1). Counsel herein requests this Court to allow errata or strict proof on this point at a later date. Counsel herein is representing an informa pauperis client and entered this case at the Appellate Court level after the briefs were submitted. The agreed upon Appendix does not contain the City Councilman's transcript but it is Counsel's understanding that the said transcript is a part of this record; Rule 17, 26 and 29(3); Stern & Grossman *Supreme Court Practice,* p. 658; (Record before Supreme Court is entire record below).

AFFIRMANCE OF THE APPELLATE COURT DECISION IS WARRANTED

The Court of Appeals followed the dictates of this Court in *Jones* and reversed the District Court. In doing so, the Court stated that the District Court relied too heavily on *Palmer v. Thompson,* 403 U.S. 217 (1971). On remand, the District Court compared the benefits of street and alley closing between Black and white citizens. The District Court's findings of fact compels affirmance. This Court, by viewing each of the factors relied upon below, strongly supports affirmance. It is apparent on this record that the City of Memphis fostered a policy of racial isolation as between the residents of Hein Park and the residents north of Hein Park.

As this Court said in *Runyon, supra*:

> "In these circumstances there is no basis for deviating from the well-settled principles of stare decisis applicable to this Court's construction of federal statutes." 427 U.S. at 175.

If this Court meant in *Jones, supra* what it said, "A dollar in the hands of a Black will purchase the same thing as a dollar in the hands of a white man" then affirmance is mandated. Clearly, if the right is to uphold property, the value of which was greatly depressed by the closing of West Drive, that right was violated by the City. The decision of the City Planning Commission to interpret the policy differently warrants reversal. This Court has stated on many occasions that:

> "Rent decisions by the administration inconsistent with that under review are relevant as to whether the statutory standard has been followed." *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 483 (19).

The administrative decision was wrong and racially motivated but citizens could not get an audience with the appropriate decision-makers prior to the decision because no notice was given to them regarding the closing. Nevertheless, this Court makes clear that:

> "One attacking an administrative decision must be given an opportunity to meet the evidence relied upon by the administrator." *Gonzales v. U.S.*, 348 U.S. 407.

This record was never presented to Respondent nor was there a hearing "at a meaningful time and in a meaningful manner" ever held. *Armstrong v. Manzo,* 380 U.S. 545 (1965).

We respectfully request affirmance.

THE CONSTITUTIONAL ISSUE OF INTENT AND PURPOSE TO ESTABLISH A VIOLATION OF 1982 NEED NOT BE REACHED

It is not necessary for this Court to render a decision on the question - whether a violation of 1982 and the Thirteenth Amendment can be established without a showing of racially discriminating intent or purpose. The evidence in the record shows clearly that this must be saved for another day. Justice Brandeis in *Ashwander v. TVA,* 297 U.S. 288 (1936) (concurring opinion) stated long ago that:

> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are . . .
>
> The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'. . . .

> The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'. . . .
>
> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction of general law, the Court will decide only the latter. . . ."

We request that this Court follow the prescription of Justice Brandeis and decline the invitation to rule on the issue of intent or purpose to discriminate.

ARGUMENTS OF PETITIONERS

Respondent has reviewed the Brief of Petitioners and believes that it states an abundance of law but few facts in which the law will support.

County Board of Arlington v. Richards, 434 U.S. 5 (1977) is in opposition for among other reasons, it did not involve discrimination under 1982. Moreover, it was a per curiam opinion that they decided the issue in that particular case. While there is a split in authority as to what weight the various circuits credit summary affirmances, it cannot be doubted that the decision has very little precedential significance in this case. One last comment on Petitioners' position is in order. On p. 13, Petitioners state:

> "While there might be a finding that the action of the City Council has a disproportionate impact on certain black citizens, which is debatable, the impact was certainly not so stark as to be found unexplainable on grounds other than race."

This construction of the disproportionate impact theory stretching reason beyond the subliminal. Black people were told in umistakable terms to stay out of Hein Park. This Court in *Feeney, supra* stated:

> "Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation." *Cramer v. United States,* 325 U.S. 1, 32-33 (1945).

There can be no doubt about the racial feeling of Hein Park residents regarding Black people using "their street."

Surely, a vote on the issue would not have helped the Black residents. But as this Court has stated:

> "A citizen's constitutional right can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Colorado General Assembly.* 377 U.S. 713, 736, 737 (1964).

CONCLUSION

For all of the foregoing reasons stated herein, we respectfully request affirmance in this cause.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MEMPHIS, *et al.*,

Petitioners,

vs.

N.T. GREENE, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1176

CITY OF MEMPHIS, *et al.*,

Petitioners,

vs.

N.T. GREENE, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS OWENS, CROSS and BURSE

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does 42 U.S.C. §1982 apply to the decision of a municipality to close a through street to public traffic at the point along that street which separates an all-white subdivision — which is alleged to be benefited by the closure — from a predominantly black area allegedly disadvantaged by the action?

2. Did the Court of Appeals err in holding that, in light of the totality of the circumstances established below, the

closing of West Drive imposed upon black residents of Memphis a badge of slavery of the very sort which Congress intended to proscribe under 42 U.S.C. § 1982?

3. Is proof of racially discriminatory purpose an essential element of a claim under 42 U.S.C. § 1982?

4. Did the Court of Appeals err in its alternative holding that the closing of West Drive was undertaken with the intent of discriminating against blacks and therefore violated 42 U.S.C. § 1983 and the Fourteenth Amendment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set out at Pet. Br. 2-3, this case also involves the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983, the texts of which are set out in Appendix A to this brief, *infra*.

STATEMENT OF THE CASE

A. *Factual Background and Administrative Proceedings.* Hein Park, a residential subdivision located in central Memphis, has been an exclusive area for whites since well before World War II. It is bordered on the west by the "handsomely landscaped" campus of Southwestern College; on the south by North Parkway, which forms the boundary of Memphis' major municipal park;[1] on the east by Trezevant Street, a major north-south thoroughfare; and on the north by Jackson Avenue, which is a major east-west artery (A. 167).[2] This lawsuit concerns West Drive, a "scenically beautiful" street which runs through Hein Park from Jackson Avenue to North Parkway (Tr. 63). West Drive is the natural southern extension of Springdale Street, which is an important north-south route serving the predominantly black community to the north of Jackson Avenue. Prior to the street closing which is the subject of this case, the bulk of the vehicular and pedestrian traffic using

[1] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 406 (1971).

[2] "A. ____" refers to the Appendix in this case; the trial transcript is cited herein as "Tr. ____" and trial exhibits are referred to as "Exh. ____."

West Drive was accounted for by blacks. This traffic apparently originated north of Jackson Avenue since, at the time of trial, West Drive property owners — like all Hein Park residents — were white (A. 174).

In 1970, an effort was made by residents of Hein Park to close four streets leading into the subdivision, thus blocking almost all public access to the area. The City of Memphis refused to do this, but noted that a major portion of the thorough traffic using subdivision streets could be eliminated by closing off West Drive at Jackson.[3] On July 9, 1973, picking up on this suggestion, the Hein Park Civic Association petitioned the Memphis and Shelby County Planning Commission to close West Drive at its intersection with Jackson "to curtail the use of subdivision streets for through traffic. . . ." (Exh. 13.) On August 24, 1973, apparently in response to objections by certain city departments, the application was modified to "alleviate objections to the closure due to excessive length of a Dead End street and inaccessibility to interior portions of the Hein Park Subdivision by Police, Fire & Sanitation vehicles" (Exh. 7).[4] Nevertheless, on October 4, 1973, this request was also rejected due to "unfavorable departmental recommendations" concerning the closure (Exh. 21).

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[3]The Hein Park street closing request was rejected in 1970 after objections by the police, fire, and sanitation departments. In addition, city officials noted that "there is a question as to City maintaining streets which are not fully open to the public" and "there also could be a question as to the City's authority to close these street entrances after the public has formerly enjoyed their use." The letter of rejection stated that these questions had not been referred to legal counsel since the proposal was otherwise unacceptable. (Exh. 14.)

[4]Robert M. Wilkinson, Deputy Director of Planning, had noted in a memorandum dated August 10, 1970 that "closure of West Drive would create a 'block' over 3200 feet long between Trezevant and University. This would be a very bad situation" (Exh. 14).

After the Civic Association sought reconsideration, the Planning Commission met with Hein Park residents[5] and on November 2 wrote to the city attorney that it had decided to recommend closure if two conditions were met (Exh. 4).[6] On January 29, 1974, the Memphis City Council voted in a public meeting to approve the street closing (Exh. 26, at 37-38).[7] It was the only time in the history of the city that a street previously used as a public thoroughfare was closed.

During its deliberations about West Drive, the council was informed specifically that the requested closing would mainly affect blacks and appeared — to most blacks and to at least some whites — to be an effort to maintain separation of historically segregated neighborhoods along racial lines. For example, the City Council members received a petition submitted by the predominantly black Shankman Hills Civic Club which stated that "this closing symbolizes in unmistakeable terms a white neighborhood shutting its door on

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[5]By letter dated October 24, 1973, the Planning Commission notified the President of the Civic Association that a public hearing would be scheduled for November 13, 1973 (Exh. 43). But the Commission decided to approve the closing before that date. The Director of Planning subsequently told the City Council that (without specifying any date) notices were sent to people *on West Drive* and a "lengthy public hearing at our Planning Commission" was held (Exh. 26, pp. 2-3). In fact, there was no "public" hearing (Tr. 27, 178-79).

[6]"(1) Applicant either pay relocation costs for existing Memphis Light, Gas & Water facilities *or* provide easements for existing and future utilities. (2) Fire Department will require a minimum of 24 feet of clearance with no obstructions other than the rolled curbing as submitted on the normal type of rolled speed breaker."

[7]The approval of the Council was reaffirmed on February 5, 1974 when a motion to reconsider was defeated (Exh. 27). A resolution to reopen West Drive was discussed on three occasions that spring (Exhs. 28-30). No action was taken. The matter was before the City Council for the last time on January 31, 1978 for correction of an error in the original resolution (Exh. 41).

its adjacent Black and integrated communities." Black witnesses, including the original plaintiff, N.T. Greene, expressed similar sentiments (Exh. 26, pp. 35-36; Exh. 30, at 6, 7-8). A councilman made reference to the "behind the scenes reasonings" for the street closing (Exh. 41, p. 17). And a white resident told the council of his Hein Park neighbors' reaction when he opposed the street closing: surprise at his support for the "niggers" (Exh. 30, at 1).[8] As described during the council hearings, the closing was to be accomplished by deeding a strip of land, 25 feet in depth and extending across West Drive at its intersection with Jackson Avenue, to the northernmost property owners on West Drive; and by erecting a physical barrier giving the appearance of a continuous curb along Jackson Avenue. Plantings extending part of the way from the shoulders toward the center of West Drive would provide further screening. A 24-foot gap punctuated by speed breakers would enable emergency vehicles to cross the strip (Exh. 26, pp. 16-17).[9]

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[8]The relevant portion of the testimony at the council meeting of March 5, 1974 (when the reopening of West Drive was considered) from this witness is as follows (Exh. 30, p. 1):

> But if you want me to, I will spell it out for you. Mr. Chairman, the answer is sitting right here. The well-to-do white people living in Hein Park do not want black people or the few of us who refuse to run away living north of Jackson to drive on — to drive on — what they think is their street. I phoned a man — I phoned a man with whom I have been friendly for more than 65 years. His wife answered and would not let me speak to him. So as the rights and wrongs were discussed, she said to me "Leo and I were surprised to see you sitting with that group of niggers." That, Mr. Chairman, is the issue here.

This witness died before the case came to trial after the Court of Appeals' remand. *See* Tr. 49.

[9]A barrier of somewhat different design is now in place. It consists of two parallel rolled curbs across the mouth of West Drive with several rows of plantings in between. The effect is not unlike railroad tracks filled in with dirt and rows of plants.

B. *Judicial Proceedings.* In 1974, this suit challenging the decision to close off West Drive was filed. Motions to dismiss the original and amended complaints were granted by the district court on October 4, 1974. Although that court did not specify the precise reason for its action, the Court of Appeals later observed that the dismissal must have been for failure to state a claim upon which relief can be granted, under F.R. CIV. P. 12(b)(6) (A. 38, n.1; *compare* A. 30-31).

The Court of Appeals reversed. Applying the principle that dismissals on the pleadings are not favored, the court ruled that the complaints, read together and

> . . . construed favorably to the pleader . . . reasonably aver that the closing confers certain benefits, to *wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit in their property.

(A. 40.)[10]

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[10]The Court of Appeals also held that the plaintiffs had alleged the elements of a §1983 claim against the Mayor and City Council Chairman even though they had not specifically sought to rely on that statute. The court then inserted the *dictum* that has spawned so much confusion in this case regarding the elements of a cause of action under the 1866 and 1871 Civil Rights Acts (A. 42-43):

> To establish a Section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

On remand, a motion to intervene as plaintiffs was filed by the Owens, Cross and Burse respondents on March 29, 1977, and granted on April 11, 1977. Intervenors alleged that the defendants had violated their rights under § 1982 in that the closing of West Drive at the north end would confer upon white residents of West Drive and Hein Park benefits not available to blacks living in adjoining and surrounding streets, for example, "increased property values, solitude, safety and better environmental quality in general" (A. 50, ¶ VI of complaint). A subsequent amended complaint filed on May 24, 1977 (A. 55) alleged that the affluent white residents of Hein Park, with the support and acquiescence of City officials, had sought to preserve the all-white nature of the subdivision and protect it from incursions by black residents into the area (A. 55). It further alleged that West Drive was "a direct and essential route of access to Snowden School, a public school, and the north entrance to Overton Park, a public park, and said way is traversed mainly by black youth and other blacks . . ." (A. 55-56).[11]

At the trial on February 13-14, 1972, plaintiffs presented unrebutted testimony that the West Drive closing would have adverse financial and social consequences for the black community to the north of Jackson Avenue. A realtor predicted that the action would result in increased property values for white owners in Hein Park while further depressing property values in black neighborhoods above Jackson Avenue. A sociologist linked the street closing to historic patterns of segregation and discrimination in Memphis and warned of the potential increases in aggressive

[11]The intervenors also sought class certification on behalf of "similarly situated black citizens seeking to enjoin the closing of West Drive to through traffic" (A. 49). On October 3, 1977, the district court certified a class in accordance with a stipulation filed by the parties on September 29, 1977 (A. 67).

behavior and vandalism which could result. Several plaintiffs related their desire to make use of the thoroughfare in their daily activities and their reactions to the proposal. In addition, the entire administrative record of proceedings before the Council and the Planning Commission was entered into the record. City officials defended the decision as a "nonracial" effort to accommodate the desires of residents; they also pointed to instances in the past when platted but unopened streets or alleys had been transferred to black businesses or churches upon request.

The district court refused to interfere with the street closing. Although he recognized that its effects would be felt overwhelmingly by blacks living north of Jackson Avenue, the district judge regarded himself limited by a very narrow reading of the Court of Appeals' prior *dictum* in the case (*see* note 10 *supra*). Plaintiffs had not prevailed, in this view, because they had not demonstrated racial motivation on the part of city officials, nor shown a significant departure from normal procedures for the benefit of the white Hein Park residents. (Since the West Drive action was the only closing of a street in prior public use in the city's history, the court felt that there was nothing to which to compare it, even though he rejected the city's argument that black neighborhoods received similar benefits when unopened streets or alleys were transferred.) This determination was reversed by the court below, which concluded from its review of the record that a violation of 42 U.S.C. § 1982 had been established.

The Court of Appeals clarified that it had not intended, in its first opinion, to set limits on the kind of evidence needed to establish a violation of § 1982. Although a refusal by the City to grant a similar application to blacks would have been one way to demonstrate a violation of the statute, the

plaintiffs were not foreclosed from establishing a violation by other evidence. The court concluded that the closing of West Drive under the unique circumstances disclosed by the record constituted a badge of slavery related to the plaintiffs' right to hold property on an equal basis as white citizens, thereby coming within the parameters of § 1982. The court also found the evidence sufficient to establish racial *animus* under the standards articulated by this Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

SUMMARY OF ARGUMENT

I.

The closing of West Drive under the circumstances of this case violated 42 U.S.C. § 1982. That statute declares in broad terms that all citizens shall have "the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property," and this Court has given it an expansive interpretation, as befits its broad remedial purpose to eradicate the badges and incidents of slavery. In applying the law, courts must consider the totality of the circumstances to determine whether a challenged action falls within the statutory proscription.

When the City's action in closing West Drive is considered in historical context, taking into consideration its immediate objective and ultimate effect, it is clear that the statute has been violated. Closing West Drive created a tangible as well as a psychological barrier between the white and black communities. Its effect was to benefit white residents of Hein Park but to depress property values in the

area north of Jackson Avenue. It served as a warning to blacks to stay out of the subdivision. Under these circumstances, the closing of the street adversely affected the ability of blacks to hold property on an equal basis with white citizens.

II.

The petitioners are wrong in suggesting that constitutional standards of proof are applicable in the present context. It is well settled that Congress may, under the enabling provisions of the post-Civil War amendments to the Constitution, establish more stringent standards than would be required by the amendments themselves.

There is no evidence that the 1866 Congress desired to limit the application of § 1982 solely tointentional discrimination. The language of the statute carries no such implication. Legislative history shows that Congress was concerned about facially neutral statutes — such as the vagrancy laws enacted as part of the Black Codes — that had a discriminatory impact on blacks.

The only Congressional discussion of intent focused on the penal provisions of § 2 of the 1866 Act. Proponents of the bill maintained that a requirement of proof of intent could be inferred from the fact that § 2 was a criminal provision. They made no reference to the bill's civil liability provisions and no similar implication can be drawn concerning § 1982, the civil redress section of the Act. And, none of this Court's prior cases involving § 1982 has interpreted the statute to require a showing of racial motivation.

III.

The Court of Appeals specifically reserved the question whether intent must ever be proved to establish a violation of § 1982. But it did address the issue whether plaintiffs had met their burden of proof under their alternative theory based on § 1983 and the Fourteenth Amendment. The evidence, taken as a whole, meets the standard of intentional discrimination set forth in *Washington v. Davis* and *Arlington Heights.*

ARGUMENT

I.

THE EVIDENCE PRESENTED TO THE DISTRICT COURT WAS SUFFICIENT TO ESTABLISH A VIOLATION OF 42 U.S.C. § 1982.

Although petitioners have attempted to characterize the action of the City of Memphis in closing off West Drive as nothing more than the legitimate exercise of its plenary authority over land use, in fact far more is involved in this case — as both the trial court and the Court of Appeals recognized. The majority below emphasized the relevant points of difference between the West Drive decision and routine zoning activities:

> . . . The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected

> precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.

610 F.2d at 404.[12]

The Court of Appeals' analysis was entirely correct. As we show below, in appropriate circumstances (such as those involved here) a street closing may violate 42 U.S.C. § 1982 by restricting the "property rights" of residents of black

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[12]Similarly, the district court recognized that the street closing would have what it termed a "disproportionate impact on certain black citizens" (A. 161):

> As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

neighborhoods. Further, the Court of Appeals appropriately assayed the city's action in light of historical conditions to determine its full significance.

A. 42 U.S.C. §1982 Encompasses the City's Action Blocking Access to West Drive.

Petitioners contend that this case is governed by *Palmer v. Thompson,* 403 U.S. 217 (1971) because the city's "action now before the Court can no more be said to be a 'badge or incident' of slavery than could the closing of the pools in *Palmer*" (Pet. Br. at 13). But as the court below recognized, the gravamen of this action is the asserted violation of 42 U.S.C. §1982, not a direct claim under the Thirteenth Amendment — the situation in *Palmer.*[13] 610 F.2d at 402 n.8.

Section 1982 is a remedial measure enacted pursuant to Congress' enforcement authority granted in §2 of the Thirteenth Amendment; and, as this Court has emphasized, it is to be "accord[ed] a sweep as broad as its language." *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968). In a variety of factual settings, this Court and the lower federal courts have, accordingly, taken an expansive view of the rights protected by §1982.[14]

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[13]In *Palmer,* Mr. Justice Black, for the Court, rejected an argument that a city's closing of public swimming pools had imposed a "badge of slavery" on its black citizens in violation of the Thirteenth Amendment. He stated that, absent applicable Congressional legislation, this Court lacked the "lawmaking power" to determine what conduct amounted to a "badge of slavery." 403 U.S. at 227.

[14]In Hurd v. Hodge, 334 U.S. 24 (1948), this Court rejected the claim that the statute prohibited only those actions affecting blacks which "wholly disabled them because of their race." It held enforcement of racially restrictive covenants invalid under the statute even though

(continued)

(footnote continued from preceding page)
blacks were not denied the general right to purchase or lease other property in the jurisdiction. *Jones, supra,* rescued the enactment from a century of desuetude by confirming its application to transactions between private parties, pursuant to the Thirteenth Amendment's broad commission to Congress to fashion legislation suitable for abolishing all the remaining incidents of slavery. *See* Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), this Court interpreted the term "property" in § 1982 to include a membership share in recreational facilities which could be assigned to a tenant. In Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973), the statute was held to protect a black person's right to exercise an *option* to purchase a swim club membership to fill a vacancy created by the resignation of the individual from whom he had purchased his house, even though membership rights themselves could not be transferred between sellers and buyers.

The lower federal courts have continued to interpret § 1982 broadly, to expand the "elusive" concept of "property", Terry v. Elmwood Cemetery, 307 F. Supp. 369, 373 (N.D. Ala. 969). (Holding that a purchaser's interest in a burial lot is a property right, the *Terry* court quoted one definition from H. Cohen, FUNDAMENTALS OF LAND USE LAW ix (1962): "[A] 'property right' of any nature may be defined as "that type of relationship which is entitled to protection from a decision maker.' " 307 F. Supp. at 374.) In Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974), the court addressed an issue left unresolved in *Tillman,* and ruled that a black person invited by a swim club member to use the facilities of a swim club as the member's guest has enforceable "property" rights against discrimination under § 1982. As the court analyzed the issue,

> It is reasonable to characterize the freedom of blacks to go and come as guests of a swim club member as sufficiently pertaining to a condition of property to be a right capable of being held under § 1982.

495 F.2d at 1339. *See also,* Walker v. Pointer, 304 F. Supp. 56, 61-62 (N.D. Tex. 1969) (white tenants may not be evicted for entertaining black guests, under § 1982).

The reported decision which most closely parallels this case is *Jennings v. Patterson,* 488 F.2d 436 (5th Cir. 1974). There, private parties (with the acquiescence of city authorities) erected a barrier across a public road which prevented residents to the east of the blockade — who with one exception were black — from using the western portion of the street. The single white resident was given an easement across the barrier, but for the black residents "[w]ithout this access, one and a half to two miles are added to the journey to town." 488 F.2d at 439. The Court of Appeals reversed the district judge's ruling that there was no discrimination, finding that the blacks had been "denied the right to hold and enjoy their property on the same basis as white citizens." *Id.* at 442.

In the instant case, as in those described above, the plaintiffs' property rights are affected by the decision of the Memphis City Council to interpose a barrier between the white and black communities. There was unrebutted testimony, credited by both the district court and the Court of Appeals, that closing West Drive would increase property values on that street and depress values north of Jackson Avenue (*see* Tr. 45, 118-19). Moreover, by giving the property owners to whom the city transferred the 25-foot strip of West Drive the power to selectively bar black pedestrians from entering West Drive, the plaintiffs' right "to go and come at pleasure" is affected, *Bell v. Maryland,* 378 U.S. 226, 293 n.10 (1964) (Goldberg, J., concurring). And finally, by creating a white enclave, the city gave the white residents of West Drive a perceived benefit that has no comparable duplicate for black citizens residing in the area around Springdale Street. Because of residential segregation, the barrier serves as a constant reminder that blacks are not welcome on West Drive and in Hein Park.[15]

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[15]As the Court of Appeals put it, 610 F.2d at 404, the closing of West Drive was "an unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision."

Thus, the court below properly concluded that an isolated street closing which divides neighborhoods along racial lines, and which confers a benefit on the white community that is denied to the black community, violates the right of blacks to hold property on an equal basis as whites and therefore constitutes an incident of slavery that is within the Congressional power to prohibit under § 2 of the Thirteenth Amendment.

B. The Court of Appeals Correctly Considered All the Surrounding Facts and Circumstances in Reaching the Conclusion that the Closing of West Drive Violated § 1982.

As we have shown, under this Court's decisions there is no sharp dividing line between property-related interests which are or not vouchsafed to minority citizens under 42 U.S.C. § 1982.[16] In some circumstances, a street closing may violate the statute even though it might not transgress the Fourteenth Amendment's equal protection clause, just as the opportunity to attend a swim club may fall within the coverage of the law though arguably not within the scope of § 1 of the Thirteenth Amendment.[17] *See Palmer v. Thompson, supra.* The critical determination whether § 1982 has been violated requires a reviewing court to sift all the facts and circumstances in order to assess the challenged action

[16]It is likely that the rights of whites are also protected by § 1982. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

[17]In Argument II, *infra,* we explain why standards of proof developed in this Court's Fourteenth Amendment jurisprudence are inapposite in construing a remedial statute which is a valid exercise of Congressional authority under the Thirteenth Amendment. In Argument III, we demonstrate that the judgment below is correct even under Fourteenth Amendment principles.

"in terms of its 'immediate objective,' its 'ultimate effect' and its historical context and the conditions existing prior to its [occurrence].' " *Reitman v. Mulkey,* 397 U.S. 369, 373 (1967).[18] Judged in these terms, as it was by the Court of Appeals, the closing of West Drive clearly infringed the statute.

Although the "immediate objective" of the closure was described in the Civic Association's application as being "to curtail the use of subdivision streets for through traffic," there was evidence that suggested that the real reason for the closing was to bar entry to individuals (mostly black) residing north of Jackson Avenue (*see, e.g.,* A. 150; Exh. 30, p. 1; Exh. 41, p. 17; note 8 *supra*). The city had rejected less drastic alternatives that were available to ameliorate any heavy traffic flow on West Drive, such as speed breakers, posting a low speed limit, or closing the street during certain hours of the day. As several witnesses and councilmen pointed out during the hearings before the City Council (Exh. 26, pp. 21-22, 26; Exh. 27, p. 2; Exh. 41, p. 12), many residential areas of the city might like the luxury of a street closed to through traffic (Exh. 41, p. 17). It is therefore significant that the first and only instance in which the city closed a through street involved the erection of a barrier between white and black neighborhoods.

The "ultimate effect" of the city's action was extensively discussed by the witnesses, the district court, and the Court of Appeals. There is no dispute in this case that the primary adverse impact of closing West Drive at Jackson Avenue — inconvenience and delay in travelling to Overton Park, the Snowden public school, or other destinations to the south of the Springdale area — was visited almost exclusively upon

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[18] *Reitman* was a Fourteenth Amendment challenge to a provision of the California Constitution, but its approach is equally applicable to § 1982.

black citizens. As the district court found, "the southbound overwhelming black traffic will no longer be allowed to continue a logical and direct route across Jackson . . . . The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return" (A. 44). The trial judge also recognized that the street closing along Jackson Avenue conveyed a vivid message to the black community to the north: "Obviously, the black people north of there who[*sic*] are being told to stay out of the subdivision" (Tr. 317).[19] Furthermore, by deeding the strip of land at the mouth of West Drive to the abutting landowners, the city would be giving them an absolute right to bar pedestrian, as well as vehicular, traffic.

Unrebutted testimony presented by the plaintiffs also established that, as a consequence of the closing, property values on West Drive would increase while those north of Jackson Avenue would depreciate.[20] Finally, the proof

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[19]During the trial, the district court described the West Drive closing as "unprecedented" and then said (A. 123-24):

> I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to — I would be interested to know who is going to pay the eight hundred dollars. If we can get those two people to agree and lend us their names, we can stop these people to the north.

[20]The district court did not find this evidence lacking in credibility:

> In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits *even though* the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees" (A. 163) [emphasis supplied].

indicated that the likely consequence of closing the street would be increased racial hostility, vandalism, harassment of school children, and arrests by police. These results, of course, could be accomplished only with the assistance and participation of city authorities. *See Reitman v. Mulkey, supra,* 387 U.S. at 378-79.

Finally, the "historical context" of the West Drive closing supports a finding of discrimination. As previously indicated, Memphis had never before closed a street used by the public in order to deal with traffic congestion. Although city officials had themselves raised questions about the legality of such action when it was first proposed in 1970 *see* note 3 *supra*), no effort was made to resolve the issues before the decision to block West Drive was made. The city's normal practice was for the Planning Commission to obtain and consider comments on such matters as proposed street closings from all governmental departments. In this instance, the commission gave conditional approval to the closure without any reply from the city's Public Works Department (Exh. 26, at 2).[21] It also acted without conducting the public hearing which it had itself scheduled for November 13, 1973.[22] No official traffic impact study was undertaken in connection with the matter, and the city did

[21]During the City Council hearing on January 29, 1974, oblique reference was made to an internal memorandum from the public works department that apparently raised some objection (Exh. 26, pp. 3, 6). One councilwoman expressed surprise that the Planning Commission would reach a definite conclusion without some definite opinion from the affected government departments, and noted that "Public Works was not only involved in upkeep of the streets, but also covers a multitude of problems that deal with the condition in an area where people live" (Exh. 26, p. 4). A councilman volunteered the view that Public Works was concerned more about the "precedent as opposed to the merit of this particular matter" (Exh. 26, p. 4).

[22]*See* note 5, *supra,* and accompanying text.

not even have reliable current figures for the number of vehicles using West Drive (Exh. 26, pp. 33-34; 36-37).

Taken together, these facts and circumstances can leave no doubt about the discriminatory nature of the West Drive closure.[23]

The judgment below should be affirmed.

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[23]The Court of Appeals' summary of the salient considerations bears repeating:

> . . . The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influence which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominatly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humilations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.

Although, as we have noted above, the district court drew many of the same conclusions about the procedures followed and the effects of closing West Drive, it reached the opposite result from the Court of Appeals. The trial court's opinion makes clear that this followed from that court's reading of the prior remand opinion of the Sixth Circuit (*see* A. 159), which articulated the same standards for proving a § 1982 or § 1983 claim; to wit, constitutional standards. Thus, the district court's entire legal analysis concerned the sufficiency of the proof to demonstrate a *constitutional* violation under the Fourteenth Amendment (see A. 159-63), followed by the conclusory statement that "the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority" (A. 163)., As we explain in the next section, the Court of Appeals, in its second opinion in this case, properly construed § 1982 independently of any constitutional claim.

II.

PROOF OF RACIALLY DISCRIMINATORY PURPOSE OR INTENT IS NOT REQUIRED TO ESTABLISH A VIOLATION OF 42 U.S.C. § 1982.

Petitioners seek to avoid the force of plaintiffs' evidentiary showing (which was credited by the Court of Appeals) by arguing that this Court should import into § 1982 principles of constitutional jurisprudence developed in Fourteenth Amendment suits which require proof of a specific intent to discriminate in order to establish a violation.[24] This issue was specifically reserved by the Court of Appeals; and we continue to maintain, as we did in our opposition to the petition for a writ of certiorari, that it is not properly raised in this case.[25]

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[24]*See* Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). Petitioners also rely upon City of Mobile v. Bolden, 64 L. Ed. 2d 47 (1980); however, it seems clear that the plurality opinion's discussion of an intent requirement under the Fifteenth Amendment was *dictum* in light of the categorical statement that

> [h]aving found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that appellants ['at-large system of elections] invaded the protection of that Amendment in the present case. (64 L. Ed. 2d at 57.)

[25]The district court made an attempt to apply Fourteenth Amendment principles and concluded that the evidence did not support a finding of racial motivation (*see* note 23 *supra*). However, as the Court of Appeals pointed out, the trial judge's analysis was hobbled by his belief

> that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment.

(continued)

Since the Court has granted review, however, we show in this section that the cases cited by petitioners do not control the *statutory interpretation* question in this matter; that neither the language of § 1982, its legislative history, prior decisions, nor underlying public policy considerations require a showing of purposeful discrimination in order to establish a violation of the statute.

(footnote continued from preceding page)

A. 180. *Compare* colloquy at A. 124-25:

> The Court: . . .
>
> Now, the problem is we have got to try to fit it in with what the Court of Appeals says the law is. And I agree with one of the points you are making, that how in the world am I going to compare the only time it has ever happened whether they [323] doing it for blacks or whites.
>
> Mr. Speros: Well, Your Honor, we can't make cases. I mean we had to go to the files and find out what have we done in black neighborhoods. . . .
>
> The Court: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

For this reason, the Sixth Circuit quite evidently felt that the district court's finding that racial motivation had not been proved — if the issue were considered dispositive — was not entitled to any deference, *see* A. 186, n.13. This is the clear meaning of the majority opinion's statement, following its summary of the evidence, that

> [t]he foregoing citations from the record can only be reconciled with the court's ultimate decision by concluding that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief.

(A. 177) (emphasis supplied). In the following section of the brief, we show that the Court of Appeals' view of the adequacy of the proof to establish racial intent was correct.

A. The Requirements for Demonstrating a Constitutional Violation Under the Fourteenth Amendment Do Not Govern Suits Under 42 U.S.C. § 1982.

The petitioners urge the Court to apply the approach of *Washington v. Davis,* 426 U.S. 229 (1976) and *City of Mobile v. Bolden,* 64 L. Ed. 2d 47 (1980) to this § 1982 claim, and to reverse the judgment below because the Court of Appeals did not hold discriminatory intent must be proved to make out a violation of § 1982. The short answer to this argument is that *Washington v. Davis, supra,* holds, and *City of Mobile v. Bolden, supra,* suggests (*see* note 24 *supra*), only that intent must be proven to establish a constitutional violation under the Fourteenth and Fifteenth Amendments, respectively.[26] The case at hand involves a *statutory* cause of action.

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[26]The logic of Washington v. Davis' reading of the Fourteenth Amendment equal protection clause, we respectfully suggest, does not compel a similar interpretation of the Thirteenth Amendment. The Fourteenth Amendment subjects all legislative and administrative classifications to potential judicial scrutiny; the Thirteenth Amendment is limited in its scope to the "badges and incidents of slavery". For this reason, a determination that the Thirteenth Amendment does not require a showing of discriminatory intent to invalidate an act which perpetuates the status or incidents of servitude could hardly be said to "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Washington v. Davis, *supra,* 426 U.S. at 248 [footnote omitted]. *See Developments in the Law — Section 1981,* 15 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 29, 183-84 (1980). But even if the Thirteenth Amendment does require a showing of intent, that would not resolve the instant case. For, we repeat, plaintiffs' claim here is brought pursuant to § 1982, a statute passed pursuant to the enforcement power granted Congress by § 2 of the Thirteenth Amendment.

It is now well settled that, in carrying out its legislative authority under the Reconstruction Amendments, Congress may establish more stringent standards than the language of the Amendments themselves would require. For example, on the same day that the plurality in *City of Mobile v. Bolden, supra,* suggested the inappropriateness of an "effects" test under the Fifteenth Amendment, this Court upheld the same standard in § 5 of the Voting Rights Act of 1965, which was enacted pursuant to § 2 of the Fifteenth Amendment. *City of Rome v. United States,* 64 L. Ed. 2d 119 (1980). *Compare, e.g., Washington v. Davis, supra,* with, *e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Nothing in the language of the Thirteenth Amendment suggests that Congress' authority to define the "badges and incidents of slavery" through remedial legislation is any more limited than its remedial powers under the Fourteenth and Fifteenth Amendments.

Indeed, Congressional authority under the Thirteenth Amendment to make discriminatory actions illegal without the necessity of showing intent has been recognized and sustained by the lower federal courts, in cases involving application of the Fair Housing Act of 1968, 42 U.S.C. § § 3601 *et seq.* (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81).[27] The dispositive question in this case, therefore, is whether a "discriminatory intent" requirement can be gleaned from the language and history of the statute in question, 42 U.S.C. § 1982.

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[27]Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied sub nom.* Whitman Area Improvement Council v. Resident Advisor Bd., 435 U.S. 908 (1978); Fox v. HUD, 468 F. Supp. 907 (E.D. Pa. 1979); United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978); United States v. L&H Land Corp., Inc., 407 F. Supp. 576 (D. Fla. 1976).

B. The Plain Language of § 1982 Includes No Requirement for a Showing of Racial Intent.

To paraphrase this Court's comment when interpreting another remedial, civil rights law, "the objective of Congress in the enactment of [§ 1982, as contained in § 1 of the Civil Rights Act of 1866] is plain from the language of the statute."[28] It was to ensure to all citizens "the same right, in every state and territory in the United States . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." Nothing in this broad phrasing suggests that racial *animus* need be shown to bring its protections into force, and this Court has consistently declined to read qualifications, additional requirements, or exemptions contained in other legislation into the 1866 Act.[29]

The statute was designed to uproot the institution of slavery, and to eradicate its badges and incidents. *See Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 422-37; *Tillman v. Wheaton-Haven Recreation Ass'n, supra*, 410 U.S. at 439. Congress acted to ensure that all persons, black and white, would be afforded equal opportunities to secure those rights which the framers deemed fundamental to a civilized society, and which they enumerated in the statute. *McDonald v. Santa Fe Trail Transp. Co., supra.* It is the

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[28]Griggs v. Duke Power Co., *supra,* 401 U.S. at 429-30.

[29]Thus, for example, in Jones v. Alfred H. Mayer Co., *supra*, this Court emphasized that § 1982 is not just an elderly progenitor of the Fair Housing title of the Civil Rights Act of 1968. The coverage of § 1982, . . . is markedly different from that of the Civil Rights Act of 1968." 392 U.S. at 417 n.21. While it is clear the the two statutes share some of the same goals, § 1982 is broad and general, whereas Title VIII is specific and directed.

condition of having lesser rights and opportunities to enjoy real and personal property than those "enjoyed by white citizens" which demonstrates a violation of the statute.

In *Jones, supra,* this Court held that the statute was "cast in sweeping terms", 392 U.S. at 422, and that it should be given a "sweep as broad as its language", *id.* at 437. It has rejected attempts to alter the plain meaning of the broad language through "ingenious analytical" arguments, *id.*, or through a stilted and "mechanical reading" of its language, *McDonald v. Santa Fe Trail Transp. Co., supra,* 427 U.S. at 287. These precedents compel rejection of the petitioners' argument in this case.

C. The Legislative History of the Civil Rights Act of 1866 Supports a Broad Reading, Unrestricted by an Intent Requirement, of the Civil Provisions of the Statute.

It would be unrealistic to examine the legislative history of the Civil Rights Act of 1866 for discussion of disparate-impact analysis similar to this Court's opinion in *Griggs v. Duke Power Co., supra.*[30] There are strong indications in the legislative history of the 1866 Act, however, that a broad reading of the statute is more in harmony with the intent of Congress than a restriction of its reach to acts of purposeful discrimination.[31]

[30]Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?,* 1977 DUKE L.J. 1267, 1280; *Developments in the Law — Section 1981, supra,* 15 HARV. CIV. RIGHTS-CIV. LIB. L. REV. at 48-49, 68-69, 177. *See* City of Mobile v. Bolden, *supra,* 64 L. Ed. 2d at 98 n.27 (Marshall, J., dissenting).

[31]Such indications are of particular importance in construing statutes of this period, because a contemporaneous doctrine of statutory con-

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(1) Direct evidence that Congress did not intend to limit the civil provisions of the statute by an intent requirement

The strongest indication that Congress did not wish to limit the reach of the 1866 Act by incorporating an intent standard arose in the course of debate on the effect of the statute on the "Black Codes" adopted by Southern legis-

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struction held that the words and original application of a statute did not necessarily limit its effect. Like a judicial precedent, a statute was considered as being, to some extent, capable of growth under the demands of a changed situation, so that it would continue to serve its original purposes. This Court recognized the doctrine of "the equity of the statute" in United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845), but cautioned that there should not be "an equitable construction of statutes beyond the just application of adjudicated cases." In Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 504 (1871), this Court held that "severe and literal" constructions should be avoided, and continued:

> A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law maker constitutes the law.

See also Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892), quoted in United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979); Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213 (1934). Whatever may be the current force of this doctrine, see, e.g., Pope v. Atlantic Coast Line R. Co.,. 345 U.S. 379, 390 (1953) (Frankfurter, J., dissenting), it was undeniably accepted in the late 1860's, and the Thirty-Ninth Congress must be considered — absent persuasive evidence in the legislative history of the 1866 Act to the contrary — to have framed the Act under the assumption that its interpretation would not be limited to the specific situations then facing the nation, but was capable of growth to meet new situations. *See* Note, *supra,* 1977 DUKE L.J. at 1284-88. If there is no adequate direct evidence as to an intent requirement, therefore, the inquiry must shift to the identification of the primary purpose of Congress. If that purpose was to secure a practical result, this would indicate an intention that the reach of the statute be capable of growth sufficient to accomplish that result.

latures after the end of the war.[32] The Congress desired to enact into positive law, in the statute, the military orders disapproving those codes. Many provisions of the Black Codes were not discriminatory on their face; some went so far as to guarantee blacks the right to own property.[33] The evils Congress sought to redress in relation to these codes were of two kinds: the explicit racial discrimination in some provisions of the codes,[34] and also the racially disparate operation of certain harsh but facially neutral provisions such as the vagrancy and apprenticeship laws. These latter provisions applied to blacks and whites alike,[35] but harmed

[32]Within three months after the adoption of the Thirteenth Amendment in December, 1865 (and during the period when the Civil Rights Act was under consideration by the Congress), every Confederate state except Texas enacted a Black Code. *See* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE 117, 1226-28 (1971). Many members of Congress believed that the enactment of the "Black Codes" throughout the South in 1865 and 1866 threatened to nullify the Thirteenth Amendment.

[33]R. Kohl, The Civil Rights Act of 1866, Its Hour Come Round at Last, 55 VA. L. REV. 272, 276-78 (1969). The Black Codes were collected in 1 S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170-230 (1866).

[34]It appears that only Mississippi and certain localities within Louisiana expressly prohibited blacks from owning real property. E. McPHERSON, POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 31 (1871) (Mississippi); 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279 (1906) (Parish of St. Landry, Louisiana); W. FLEMING, DOCUMENTS RELATING TO RECONSTRUCTION 31 (1904) (Opelousas, Louisiana).

[35]1 S. EXEC. DOC. NO. 6, *supra* n.33, at 170-71 (Alabama, Act of December 15, 1865 concerning vagrants or vagrancy), 180-81 (Georgia, Act of March 17, 1866 in relation to apprentices), 181-83 (Louisiana, Act regulating labor contracts for agricultural pursuits, not

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blacks to a much greater extent than whites because of the private actions of whites in refusing to sell land to blacks or to employ blacks at a fair wage.[36]

The provisions of the Virginia vagrancy law are an excellent case in point. On its face, the statute applied to both blacks and whites, and defined as vagrants the members of either race who were beggars, or who had no visible means of support, or who, "not having wherewith to maintain themselves and their families, . . . live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place there they then are." Vagrants of both races were subject to arrest and to a warrant ordering them "to be employed in labor for any term not exceeding three months . . . for the best wages that can be procured . . . to be applied . . . for the use of the vagrant or his family."[37] Nine days after its enactment, Major General A.H. Terry, the Commander of the Department of Virginia, issued an order prohibiting the enforcement of this vagrancy law because, regardless of the intent of the legislature, private actions would make its actual operation

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then signed by the Governor), 184-85 (Louisiana, Act of December 20, 1865 for the punishment of vagrancy), 186 (Louisiana Act of December 21, 1865 in relation to apprentices and indentured servants), 218-19 (South Carolina, § § 95-99 of the Act of December 21, 1865, relating to vagrancy), 229-30 (Virginia, Act of January 15, 1866 providing for the punishment of vagrants). As will be seen hereafter, the provisions of the Black Codes were discussed frequently in the debates on the 1866 Act.

[36]Part II, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. 55, 83, 235-36 (1866); Part II, *id.* at 9, 22, 36, 71; Part IV, *id.* at 56, 69, 82, 117; REPORT OF GENERAL CARL SCHURZ, 1 S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 22, 24-25, 82 (1865), R. Kohl, *supra* n.33 at 279-83.

[37]The complete provisions of the Virginia Act of January 15, 1866, entitled "An Act Providing for the Punishment of Vagrants", are set out in Appendix B to this Brief, *infra*.

more onerous for blacks than for whites.[38] E. McPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 42 (1871). The President refused to disapprove this Order. *Id.*

This was not an isolated occurrence. In South Carolina, Major General D.E. Sickles ordered on January 17, 1866 that the only vagrancy laws that could be enforced in the state were those "applicable to free white persons", and ordered further that even these laws, made racially neutral by his order, "shall not be considered applicable to persons who are without employment, if they shall prove that they have been unable to obtain employment, after diligent efforts to do so." Order of January 17, 1866, ¶ XIII, quoted in E. McPHERSON, *supra,* at 37. Orders quashing state laws were also issued by General Swayne in Alabama and by General Thomas in Mississippi.

In the debates on the 1866 Act, these Orders were frequently discussed and approved. Several members of Congress stated their view that the provisions of these Orders would be continued by the provisions of the Act, and would thus both survive the end of military government in the South and be made applicable nationally.[39]

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[38]The pertinent portion of General Terry's Order is set out in Appendix C to this Brief, *infra*.

[39]Senator Wilson described the facially neutral Virginia vagrancy law as having been "used to make slaves of men whom we have made free." He thanked General Terry for his Order, and described the state laws set aside by military order as "nearly as iniquitous as the old slave codes that darkened the legislation of other days." He thought passage of the civil rights bill was required in order to bar such state laws forever. CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) [hereafter, CONG. GLOBE]. In the debate on initial passage, Senator Trumbull, the manager of the bill, stated that one of its purposes was to destroy all the discriminations of the Black Codes. CONG. GLOBE 474. In the debate

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If Congress or the military had wanted to restrict their actions to purposeful discrimination, they could have stopped with outlawing the private combinations of employers that manipulated the vagrancy laws to bear more heavily on blacks than on whites. Both Congress and the military understood that they were going further, however, to prohibit the enforcement of these facially neutral laws.

Further indication of the intent of Congress is provided by the debate on §2 of the Civil Rights Act of 1866, 14 Stat. 27[40] — the penal enforcement provision. The only dis-

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onpassage of the bill over the President's veto, Senator Trumbull quoted General Terry's statement that the Virginia vagrancy law would have the effect of "[reducing] the freedmen to a condition of servitude worse than that from which they have been emancipated", and cited the orders issued by Generals Terry and Sickles as demonstrating the existence of the evils — denied by the President — that the bill was intended to redress. CONG. GLOBE 1759, 1760.

The House debate was equally clear. Representative Cook cited the vagrancy laws and the orders of Generals Thomas, Swayne, Sickles and Terry, and continued:

> ... The question is, shall we leave these men in this condition? It is idle to say we are not leaving them to a system of slavery. If it had not been for the acts ofthe military commanders, had not the laws which have already been enacted by the Legislatures of the rebel States been set aside, the negroes would all have been slaves now under the operation of their vagrant acts or other laws.
>
> I believe that this bill is a proper remedy for these evils. ...

CONG. GLOBE 1124. Representative Thayer cited the Black Codes, and the military orders prohibiting their enforcement in Mississippi, Alabama, South Carolina, and Virginia, as demonstrating that the Thirteenth Amendment would be "of no force or effect whatever" if the bill were not enacted. CONG. GLOBE 1153. Representative Windom endorsed General Terry's order setting aside the Virginia vagrancy law, and said that the bill would accomplish the same end. CONG. GLOBE 1158. Representative Broomall took the same position. CONG. GLOBE 1263.

[40]Sec. 2 of the Civil Rights Act of 1866 has evolved into 18 U.S.C. §242. *Jones, supra,* 392 U.S. at 424 n.32.

cussion of "intent" by the Congress during consideration of the Act was in reference to § 2. It was occasioned by the claim of opponents of the bill that § 2 would authorize the arrest of a state judge for following in good faith the provisions of a state constitution or of state laws which were subsequently found to be inconsistent with the bill.[41] The proponents of the legislation responded by stating that the requirement of unlawful intent could be inferred from the fact that § 2 was a penal provision, and that there was therefore no need to add an intent requirement to this section of the statute.[42] If any other provision of the statute had been considered by its proponents to require intent, they would surely have pointed it out rather than rely on an argument by

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[41] *E.g.*, CONG. GLOBE 475 (remarks of Senator Cowan).

[42] "[I]t requires a union of act and intention to commit a crime," CONG. GLOBE 475 (remarks of Senator Trumbull); "I suppose the esence of all crimes consists in the intention, the purpose. In the trial of criminal cases, we inquire into the *animus* with which the act was done by the accused . . .," CONG. GLOBE 502 (discussion of culpability for treason) (remarks of Senator Howard); "Sir, what is a crime? It is a violation of some public law, to constitute which there must be an act and a vicious will in doing the act . . . and a judge who acted innocently, and not viciously or oppressively, would never be convicted under this act," CONG. GLOBE 1758 (remarks of Senator Trumbull). Representative Wilson stated in the House that "there are two legal modes of meeting any and every willful deprivation of these rights: one by action for damages at common law in the courts, which, however, will not lie against judicial officers; and the other by making it a penal offense, as the second section of this bill does. . . ."CONG. GLOBE 1836. Nothing in his remarks indicates that he intended to limit civil remedies under the statute to cases of willful violations, or that he ever addressed the precise reach of the civil provisions of the bill, as distinct from the criminal provisions. No other Representative or Senator discussed a limitation of the civil provisions in a manner corresponding to the limitation of the criminal provisions.

implication.[43] Rather than supporting the petitioners' argument, set forth at p. 25 of their brief, that "even the proponents of the Act of 1866 did not conceive that the bill would remedy unintentionally discriminatory laws . . . ," the debate on this point expressly refutes it. The reference to Senator Trumbull's remarks, mistakenly cited by the petitioners to page 477 of the Congressional Globe, is taken out of context.[44]

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[43]This Court has previously held that the scope of § 2 is substantially narrower than that of § 1, Jones v. Alfred H. Mayer Co., *supra*, 392 U.S. at 425 n.33, and that the latter was intended to provide a civil remedy, *see* Runyon v. McCrary, 427 U.S. 160 (1976). This function of § 1 was equally clear at the time of its passage, for Section 3 of the Act, 14 Stat. 27, contemplated that civil suits would be brought in state courts to enforce the rights granted by the Act — no grant of general Federal-question jurisdiction having yet been made to U.S. District and Circuit Courts — and provided jurisdiction in the U.S. Circuit Court where such rights could not be enforced in state or local courts. The earliest application of this right of civil enforcement was in In re Turner, Fed. Cas. No. 14,247 (Cir. Ct. D. Md. 1867). There, Chief Justice Chase, sitting as Circuit Justice, ordered the discharge, on a writ of habeas corpus, of a black child who had been indentured as an apprentice under the terms of a Maryland law which did not provide the same terms of indenture for black apprentices as a different law provided for whites.

In the debate, Senator Hendricks objected that the bill would create a civil remedy for damages, CONG. GLOBE 601, and Senator Cowan objected that § 1 would enable the U.S. courts to expand their jurisdiction, CONG. GLOBE 1782-83. No one disagreed with these propositions. *See also* the remarks of Representative Wilson, *supra* note 42.

[44]It is true that, during the debates, Senator Trumbull sought to downplay the effect that passage of the bill would have on the northern states, for example declaring that the bill "will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race." CONG. GLOBE 476. In fact, after President Johnson vetoed the bill, Trumbull stated, in the context of § 2, that the bill would have no application in any state where a "colored person . . . has adequate remedies in the state courts" for an "offense"

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(2) Indirect evidence that Congress did not intend to limit the civil provisions of the statute by an intent requirement

There is strong evidence that the framers of the 1866 Act wanted the rights they declared to be capable of growth, so as to continue to accomplish their purposes under the demands of different situations. Senator Trumbull openly admitted that he did not know the exact dividing line between slavery and the liberty protected by the Thirteenth Amendment, but that he wanted to give the greatest possible practical effect to the policy declared in the Thirteenth Amendment. CONG. GLOBE 474. He went on to state that "it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins," but that the Black Codes passed that dividing line wherever it was. CONG. GLOBE 475. Time and again, the bill's proponents stressed that their aim was "practical", geared to a particular result.[45]

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against him — while seeking votes to override the veto. CONG. GLOBE 1758. These and similar remarks have never been literally construed by this Court. In Jones v. Alfred H. Mayer Co., *supra,* the Court rejected the suggestion of Justice Harlan's dissent that they constituted the "plainest possible statement" that the bill was not intended to cover purely private action. *See* 392 U.S. at 459-60 (Harlan, J., dissenting). The Court also correctly observed that Senator Trumbull could not have meant that the Act would apply only to the states "whose laws did not themselves discriminate against Negroes", since it expressly provided that it would be effective "in every state and territory in the United States." 392 U.S. at 426 n.35. Finally, if the availability of adequate remedies in state courts were the standard, then one would suppose that both § § 1981 and 1982 would be dead letters today. Yet this Court has reaffirmed their full vitality in Jones v. Alfred H. Mayer Co., *supra*, and Runyon v. McCrary, *supra* n.43.

[45]Senator Trumbull stated that the bill would secure "freedom in fact". CONG. GLOBE 476. Representative Thayer stated that the bill was to

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To restrict the scope of §1982 to purposeful acts of discrimination would be inconsistent with the broad practical purposes of Congress in enacting the 1866 Act. An intent requirement can readily be harmonized with the goal of ensuring the neutrality of government processes, towards which the Fourteenth Amendment's equal protection clause was later directed. However, the Civil Rights Act of 1866 was directed towards achieving the *practical result* of equality, not towards ensuring a neutral process. The purpose of the Act would be thwarted, and the equity of the statute violated, if it were construed in the manner suggested by petitioners.

D. This Court's Decisions Under §1982 Have Not Required a Showing of Purpose.

This Court's previous interpretations of §1982 have always proceeded from an initial recognition that the

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give the Thirteenth Amendment "practical effect and force". CONG. GLOBE 1151. He continued (*id.* at 1152):

> The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed; not only that that feature of slavery shall be abolished which permitted the purchase and sale of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.
>
> To put any other construction upon this great amendment of the Constitution is to deprive it of its vital force, or its effective value. It is to cheat the world by sounding phrases; and while you pretend to give liberty to those who were in bondage, to leave them in reality in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition.

Thirteenth Amendment was enacted specifically to extripate the "badges and incidents" of slavery. The Court has given a broad construction to the statute because "this amendment denounces a status or condition, irrespective of the manner or authority by which it is created," *Clyatt v. United States, 97 U.S. 207, 216 (1905). Thus, Bailey v. Alabama,* 219 U.S. 219 (1911), struck down a statute, neutral on its face, which imposed criminal penalties on persons who accepted money from an employer and then failed to fulfill the employment contract. The opinion explained:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question. *Henderson v. New York* [*Henderson v. Wickham*], 92 U.S. p. 268, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; . . . .

219 U.S. at 244-45. *See also, Pollock v. Williams,* 322 U.S. 4, 25 (1944); *Taylor v. Georgia,* 315 U.S. 25, 29 (1942); *Anderson v. Ellington,* 300 F. Supp. 789 (M.D. Tenn. 1969) (three-judge court).

The Court has both construed § 1982 consistently with its Thirteenth Amendment origins and also sustained Congress' power " 'rationally to determine what are the badges and the incidents of slavery, and [its] authority to translate that determination into effective legislation.' " *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 440, quoted in *Griffin v. Breckenridge,* 403 U.S. 88, 105 (1971).[46] And, as

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[46]*Griffin* is instructive on the issue in this case. There, the Court upheld the constitutionality of § 1985(3) under the Thirteenth Amendment, and its applicability to private parties. A claim under § 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," 403 U.S. at 102, but this follows from the statutory language itself:

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we have suggested above (II.A.), the Court has not felt compelled to bring Fourteenth Amendment concerns into cases involving Thirteenth Amendment statutes.[47] In *District of Columbia v. Carter,* 409 U.S. 418 (1973), for example, the Court observed that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources," *id.* at 423,[48] and declared that §1982 was an " 'absolute' bar to . . . discrimination, private as well as public. . . ." *Id.* at 422. In none of its rulings has this Court required a showing of racial

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> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, *for the purpose of* depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, ...

(Emphasis supplied.) Section 1982 contains no equivalent language. Clearly, where Congress intends that invidiously discriminatory motivation should be an element of a claim, nothing in the Thirteenth Amendment forbids it.

[47]It is true that §1982 was re-enacted as part of the Civil Rights Act of 1870, under the Fourteenth Amendment. But it is now well settled that Congress did not intend to repeal §1 of the 1866 Act when it enacted §16 of the 1870 Act pursuant to the Fourteenth Amendment. Runyon v. McCrary, *supra,* 427 U.S. at 168 n.8, 170-72. This reaffirmation that §1982 has its roots in the Thirteenth Amendment proved critical in determining whether a right of action could be maintained against a private party undr §1982, because the Fourteenth Amendment proscribes only discriminatory actions taken under color of state law. Johnson v. Railway Express Co., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., *supra,* 410 U.S. at 439-40; *cf.* Jones v. Alfred H. Mayer Co., *supra,* 392 U.S. at 424-30. By the same reasoning, the ruling in Washington v. Davis, *supra,* that racial motivation is an essential element of proof under the Fourteenth Amendment does not dictate the same result undr §1982.

[48]Quoting from Monroe v. Pape, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., concurring and dissenting).

motive under §1982, and the lower federal courts have followed the same approach.[49]

Petitioners rely upon two instances in which this Court's opinion in *Jones v. Alfred H. Mayer Co., supra,* used the words "racially motivated".[50] *See* Pet. Br. at 25. Since the Court in both instances was merely characterizing arguments and concessions made in the briefs of the parties in that action, this language cannot even be regarded as rising to the level of *dictum.* Even if taken at face value, the phrases are simply descriptive of the case at hand — where racial *animus* was not in dispute.[51] In *Jones,* the focus was on

[49]E.g., Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied,* 419 U.S. 1070 (1974) (§1982 forbids housing developers from charging higher prices for similar housing in black areas of the city than in white areas where segregated housing patterns result from racial prejudice); Rhode Island Chapter, Associated Gen'l Contractors v. Kreps, 450 F. Supp. 338, 363 (D.R.I. 1978) ("... §1982, the twin of §1981, *see Tillman v. Wheaton-Haven Recreation Ass'n, Inc.,* 410 U.S. at 439-40, 93 S..Ct. 1090, has been held to forbid more than intentional discrimination. It looks behind a legal and formal equality to guarantee that black persons are in fact receiving equal treatment").

[50]The first statement was in the context of rejecting the respondents' argument that a literal reading of the statute would have far-reaching implications that Congress could not have intended. The Court said:

> Indeed, even the respondents seem to concede that, if §1982 "means what it says" — to use the words of the respondents' brief — then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. 392 U.S. at 421-22.

The second statement, stressing the argument set forth in petitionrs' brief, said:

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case — that §1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, ... 392 U.S. at 426.

[51]Similar expressions in other opinions in cases involving the 1866 civil rghts statutes are likewise *dicta* because motivation was not at issue in any of them; all involved blatantly discriminatory practices. *E.g.,* Buchanan v. Warley, 245 U.S. 60, 79, 81 91917); Civil Rights Case,

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racially inspired refusals to sell or rent by private — as opposed to public — entities, and the Court plainly was not making any judgments concerning the substantive scope of the statute beyond its inclusion of private discrimination. Finally, assuming that these phrases were truly *dicta*, i.e., a ruling (unnecessary to the decision in *Jones*) that purposeful discrimination is an essential element of § 1982, than that *dicta* should not be followed. This would not be the first time that the Court has rejected *dictum* regarding § 1982; in *Jones* itself, the Court declined to be bound by statements in *Hurd v. Hodge, supra* n.14, that § 1982 applies only to "governmental action". 392 U.S. at 419-20.

The phrases upon which petitiones rely are not much different from the words "because of race", which appear in both Title VII of the Civil Rights Act of 1964[52] and in Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act).[53] In *Griggs v. Duke Power Co., supra,* this Court made no mention of the phrase in concluding that, according to the plain statutory language, discriminatory impact was sufficient to constitute a violation of Title VII unless justified by business necessity; and the lower federal courts have uniformly concluded that a violation of the Fair Housing Act can be established by a showing of discriminatory effect, without proof of invidious motivation.[54]

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supra, 109 U.S. at 36 (Harlan, J., dissenting); Runyon v. McCrary, *supra,* 427 U.S. at 170-171; Sullivan v. Little Hunting Park, Inc., *supra,* 396 U.S. at 235.

[52]Sec. 703(a), 42 U.S.C. § 2000e-2(a).

[53]Sec. 804, 42 U.S.C. § 3604.

[54]Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, *supra* n.27; Smith v. Anchor Bldg. Corp. 536 F.2d 231 (8th Cir. 1976); United States v. City of Black Jac, 508 F.2d 1179, 1183 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (*dictum*), *cert. denied,* 401 U.S. 1010 (1971); Resident Advisory Bd. v. Rizzo, *supra* n.27, 564 F.2d at 146-48.

Section 1982, of course, contains no such language and flatly states that all persons shall be protected in the rights enumerated in the statute to the same extent as white citizens. We do not dispute that § 1982 encompasses "every racially motivated refusal to sell or rent", or that it was "meant to prohibit *all* racially motivated deprivations" of the statutorily protected rights, as this Court said in *Jones*. We contend that it reaches other activities which adversely affect blacks, as well. Nothing in this Court's prior cases prevent such a ruling.

III.

THE JUDGMENT BELOW MAY ALSO BE AFFIRMED UNDER 42 U.S.C. § 1983 BECAUSE PLAINTIFFS' EVIDENCE JUSTIFIED A FINDING OF INTENTIONAL DISCRIMINATION.

We do not concede that a finding of intentional discrimination is necessary to make out a violation of 42 U.S.C. § 1982. However, the judgment of the Court of Appeals in this matter may also be affirmed under 42 U.S.C. § 1983 and the Fourteenth Amendment, which require such a finding. The evidence in this case was more than adequate to justify such a finding. As we have previously pointed out, the district judge's contrary conclusion rested upon his misreading of the prior Court of Appeals opinion. *See* note 25 *supra*. Although the Court of Appeals' opinion follows a circuitous route, we believe that, taken as a whole, it indicates the Sixth Circuit majority's view that the district court erred in assessing plaintiffs' § 1983 claim.

After summarizing the pertinent portions of the trial judge's opinion, the Court of Appeals described the *two* errors in the district court's reasoning:

> While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe [1] that he conceived himself limited in his capability to grant relief [under § 1983] by the language in *Green I* and [2] that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. (A. 180.)

The bracketed insertions, we suggest, clarify the intended meaning of the Court of Appeals' majority. They are the only interpretation of the passage which is consistent with the remainder of the opinion. For the Court of Appeals went on to address itself principally to the § 1982 issue:

> In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indedd "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]
>
> [8]Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983 . . . . (A. 180.)

The phrasing of footnote 8 in the majority opinion below is extremely significant: the Court of Appeals was pretermitting only the issue of a direct Thirteenth Amendment suit brought pursuant to the authorization contained in § 1983. The majority did not fail to "reach the question whether relief could be predicated directly on the [Fourteenth] Amendment with the cause of action lying under Section 1983." Following an extended discussion of the § 1982 violation, the majority stated in footnote 13 of its opinion, A. 186:

> We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. . . .

The only possible justification for not deciding this issue, given the attention paid to the question of "intent" in both the district court and Court of Appeals' opinions, is that the Sixth Circuit viewed the record as adequate to demonstrate intent, at least under § 1983. While a reversal on this ground might have been a clearer way of proceeding than the alternative § 1982 ground articulated by the Court of Appeals, the judgment below is proper on either basis.

The evidence discussed above at pp. - was clearly sufficient, under the standards of *Village of Arlington Heights v. Metropolitan Housing Dev. Corp., supra.* This is not a case, for example, where the only evidence relevant to the intent issue concerned foreseeability of impact. *See Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 464-65 (1979); *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 536 n.9 (1979). Rather, the "totality of the circumstances" deemed relevant in *Arlington Heights* supports the finding of discriminatory intent made by the Court of Appeals. *See City of Mobile v. bolden, supra,* 64 L. Ed. 2d at 81-82 (White, J., dissenting).

Indeed, the examples of evidence considered probative of discriminatory intent in *Arlington Heights, see* 429 U.S. at 267-68, were all present in this case:

> The impact of the official action — whether it "bears more heavily on one race than another," [citation omitted] may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. [Citations omitted.] The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. [Citations omitted.] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. [Citations omitted] . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

First, discriminatory effect was found by both the district court and the Sixth Circuit, and is not seriously contested. One may differ with the Court of Appeals' view of the degree to which the West Drive closing was a "stark" pattern; nevertheless, it is indisputable that the city chose to erect a barrier at the point of contact between black and white communities, rather than at some other intersection along the street in a manner which would reduce through traffic but not carry the symbolic message of an obstruction along Jackson Avenue. *Second,* the historical context is one which is highly suggestive of discriminatory intent, as the district judge recognized (*see* note 20 *supra*). It commenced with the historic antipathy to the presence of blacks in either the Hein Park subdivision or the Overton Park recreational facilities. *See Watson v. City of Memphis,* 303 F.2d 863, 865 (6th Cir. 1962), *rev'd* 373 U.S. 526 (1963). Plaintiff Greene testified, without contradiction, that historically black persons had been beaten "because of being in that neighborhood after dark." Tr. 37. It culminated in a series of efforts by the white residents of the subdivision "to stop these [black] people to the north" (A. 124). *Third,* the specific sequence of events leading up to the street closure gave adequate notice to city officials that the plan was insulting

and degrading to black citizens who would be excluded from traversing West Drive. One witness testified that "they don't want the black people in there, no way. That's the way it is" (Exh. 26, pp. 35-36). A white resident told the Council point blank that "[t]hat, Mr. Chairman, [the "niggers"] is the issue here" (Exh. 30, at 1). *Fourth,* the procedure was marked by both procedural and substantive departures from normal processes. For example, the Planning Commission acted hastily, in advance of the public meeting it had itself scheduled on the matter and without hearing from a major city department. Although the policy of the city generally was to avoid the creation of long streets without intersections, and although questions about the legality of the proposed street closures had earlier been raised, these concerns were swept aside in early 1974 when the Council passed on the West Drive matter.

Taken together, as the Sixth Circuit recognized, these factors left little doubt that the district judge would have found intent if he had not felt it necessary, under the prior mandate of the Court of Appeals, to have a comparison refusal to close a street upon request in a black neighborhood. *See* note 25 *supra*. Rather than send the issue back to the trial judge for reconsideration, the Court of Appeals elected to decide the alternative § 1982 question. Because its view of the record as supporting an "intent" finding was correct, however, the judgment below should be affirmed.[55]

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[55]Alternatively, the matter should be remanded to the trial court for reconsideration of the "intent" issue free from the restraints of the Court of Appeals' first remand opinion.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDICES

Appendix A

The Fourteenth Amendment to the Constitution provides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Appendix B

The complete provisions of the Virginia Act of January 15, 1866, "An Act Providing for the Punishment of Vagrants", are:

1. *Be it enacted by the general assembly,* That the overseers of the poor, or other officers having charge of the poor, or the special county police, or the police of any corporation, or any one or more of such persons, shall be, and are hereby, empowered and required, on discovering any vagrant or vagrants within their respective counties or corporations, to make information thereof to any justice of the peace of their county or corporation, and to require a warrant for apprehending such vagrant or vagrants, to be brought before him or some other justice; and if upon due examination it shall appear that the person or persons are within the true description of a vagrant, as hereinafter mentioned, such justice shall, by warrant, order such vagrant or vagrants to be employed in labor for any term not exceeding three months, and by any constable of such county or corporation to be hired out for the best wages that can be procured; to be applied, except as hereafter provided, for the use of the vagrant or his family, as ordered by the justice. And if any such vagrant or vagrants shall, during such time of service, without sufficient cause, run away from the person so employing him or them, he or they shall be apprehended on the warrant of a justice, and returned to the custody of such hirer, who shall have, free of any further hire, the services of such vagrant for one month in addition to the original term of hiring; and said employer shall then have the power, if authorized by the justice, to work said vagrant confined with ball and chain; or should said hirer decline again to receive said vagrant, then said vagrant shall be taken by the officer, upon the order of the justice, to the poor or work house, if there be any such in said county or corpora-

tion; or, if authorized by the justice, to work him confined with ball and chain for the period for which he would have had to serve his late employer, had he consented to receive him again; or should there be, when said runaway vagrant is apprehended, any public work going on in said county or corporation, then said vagrant, upon the order of a justice, shall be delivered over by said officer to the superintendent of said public work, who shall, for the like last-mentioned period, work said vagrant on said public works, confined with ball and chain, if so authorized by said justice. But if there be no poor or work house in said county or corporation, and no public work then in progress therein, then, in that event, said justice may cause said vagrant to be delivered to any person who will take charge of him, said person to have his services free of charge, except maintenance, for a like last-mentioned period; and said person so receiving said vagrant is hereby empowered, if authorized by the justice, to work said vagrant with ball and chain; or should no such person be found, then said vagrant is to be committed to the county jail, there to be confined for the like period and fed on bread and water. But the persons described as the fifth class of vagrants in the second section of this act, may be arrested without warrant by the special county or corporation police, and when so arrested shall be taken before a justice, who shall proceed to dispose of them in the mode prescribed in this section, or may at once direct them to be committed to prison for a period not exceeding three months, to be kept in close confinement and fed on bread and water.

2. The following described persons shall be liable to the penalties imposed by law upon vagrants:

Frist. All persons who shall unlawfully return into any county or corporation whence they have been legally removed.

Second. All person [*sic*] not having wherewith to maintain themselves and their families, who live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place where they then are.

Third. All persons who shall refuse to perform the work allotted to them by the overseers of the poor, as aforesaid.

Fourth. All persons going about from door to door, or placing themselves in streets, highways, or other roads to beg alms; and all other persons wandering abroad and begging, unless disabled or incapable of labor.

Fifth. All persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering and residing therein, and shall follow no trade, labor, occupation or business, and have no visible means of subsistence, and give no reasonable account of themselves or their business in such place.

3. All costs and expenses incurred shall be paid out of the hire of such vagrant, if sufficient; and if not sufficient, the deficiency shall be paid by the county or corporation.

4. This act shall be in force from its passage.

Passed January 15, 1866

1 S. EXEC. DOC. NO. 6, 39th Cong., 2nd Sess., 229-30 (1866).

Appendix C

Terry's order reads in pertinent part:

In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated — A condition which will be slavery in all but its name.

It is therefore ordered that no magistrate, civil officer or other person shall in any way or manner apply or attempt to apply the provisions of said statute to any colored person in this department.

By command of Major General A.H. Terry,
Ed. W. Smith, *Assistant Adjutant General.*

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1176

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

CITY OF MEMPHIS, ET AL.,
Petitioners,
v.
N. T. GREENE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENTS

[continued on inside cover]

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BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS, ET AL. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The grant of certiorari in *Greene* v. *City of Memphis*, 610 F.2d 395 (6th Cir. 1979) cert. granted, 48 U.S.L.W. 3726, (May 12, 1980), indicates that this Court has chosen to take advantage of a rare opportunity to in-

terpret the meaning of the Thirteenth Amendment to the U.S. Constitution. *Amici*, numerous civil rights, labor and community groups, all believe that the Thirteenth Amendment was designed to provide an effective remedy for the problem of race discrimination in the United States.

Amici have become increasingly concerned about the continuing, systematic race discrimination that exists throughout the country. They have also been attentive to the desperate and often violent responses by the victims of this discrimination. The prophecy, stated by the Report Of The U.S. Commission on Civil Disorders in 1968 [1], that the country was moving toward two separate and unequal societies, one white and one Black, has assumed contemporary relevance with the recent violent upheavels in Miami and the indications of a broadening economic, social and political gap between Blacks and whites.

This case raises the question of what exactly are the manifestations of racial discrimination in contemporary American society, and the extent to which the Courts, as guarantors of constitutional and statutory rights, can provide remedies for discriminatory action.

Amici see the case before the Court as one that presents issues that are crucial to the racial and ethnic fabric of this country, and that in essence, will go a long way toward determining the physical boundaries that will exist between Blacks and whites in the cities and suburbs of our nation. The sanctioning by this Court of the closing of West Drive may very well signal to white communities all over the country that municipal zoning power is available to physically exclude "undesirable elements", definable in racial terms, and thereby

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[1] Kerner, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, Bantam, New York, 1968, at 398.

create a virtually all white "oasis" in the midst of a rapidly deteriorating nether world.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court provided a unique and expansive interpretation of the long dormant promises of the Thirteenth Amendment by recognizing the Congressional power to define the badges and incidents of slavery and to legislate against their existence.[2] That case stands for principles central to the issues presently before the Court.

Justice Stewart, in construing the legislative history of the Thirteenth Amendment, relied on the opinions in the *Civil Rights Cases*, 109 U.S. 3 (1883), in which Justice Bradley found that the Thirteenth Amendment was not restricted to the mere prohibition of discriminatory action:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

109 U.S. at 20.

In addition, Justice Bradley held that the Thirteenth Amendment has a "reflex character, establishing and declaring civil and political freedom throughout the United

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[2] Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM, 21 RUTGERS LAW REVIEW 387 (1967) and Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM REVISITED: SOME FIRST THOUGHTS ON *Jones* v. *Alfred H. Mayer Co.*, 22 RUTGERS LAW REVIEW 537 (1968).

States." *Id.* Moreover, the *Jones* Court realized that the amendment provided "Negro citizens, [in the] North and South, . . . freedom to 'go and come at pleasure' and 'to buy and sell when they please.'" 392 U.S. at 441. The Court concluded:

> Just as the Black codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-443.

The opinion by Judge Engel for the Sixth Circuit Court of Appeals in *Greene II* properly interpreted the language of this Court in *Jones* and held that "the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly Black neighborhood under the particular circumstances found . . . is precisely the type of badge which was the target of the Thirteenth Amendment and of Section 1982". *Greene* v. *City of Memphis*, 610 F.2d 395, 403 (6th Cir. 1979).[3]

In this brief, *amici* will argue that consideration must be given to the historical conditions that existed after the Civil War and the purposes that the framers of the amendment hoped to accomplish by securing passage of the Thirteenth Amendment and subsequently enacting Section 1982. When considered in this historical framework, the notion that discrimination does not amount to a "badge of slavery" unless the perpetrators so intended it

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[3] Amici rely on the facts as set forth in the opinion of the Sixth Circuit Court of Appeals.

to is sheer absurdity. The amendment was written to outlaw slavery and its incidents. Its force is not limited to a prohibition of the intention to enslave. *Amici* will then argue that the Court of Appeals for the Sixth Circuit was correct in its analysis and conclusion. The conduct complained of in this case, the closing of West Drive, amounted to a badge of slavery. The humiliation imposed on the Black community was similar to that historically visited on Blacks under slavery. The disparate effect of the street closing on the property values and houses in the white area versus those in the Black area violated the Thirteenth Amendment and the express provisions of Section 1982.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND OF SECTION 1982, AS WELL AS INTERPRETATIONS BY THIS COURT PRECLUDE A REQUIREMENT OF PROOF OF SPECIFIC INTENT TO DISCRIMINATE.

The legislative history must be the starting point for any analysis of the Thirteenth Amendment and Section 1982. That history reveals that the framers designed the amendment to abolish slavery and all of its badges and incidents.

The intentions of the framers were unmistakable. In the words of Henry Wilson, veteran and eloquent abolitionist Senator from Massachusetts:

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or

> pertaining to it, . . . when this amendment to the Constitution shall be consummated, the shackle will fall from the limbs of the hapless bondsman . . . the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.[4]

Senator Harlan of Iowa elaborated on the necessary incidents of slavery that the amendment was designed to abolish. He specifically included the denial to slaves and their progeny of a lawful right to acquire and hold property, to sue, be sued or testify in court, or to speak, write, or publish freely.[5] As pointed out by tenBroeck:

> [T]he slavery which was within the reach of the amendment reached far beyond the personal burden of the slaves and the characteristics of immediate bondage. The Congressional debates repeated what the history of abolitionism had already . . . made abundantly clear. The free colored person, [in the] South and North . . . was only less degraded, spurned, and restricted than his enslaved fellow. His slavery as well as that of the 'hapless bondsmen' was to be abolished by the Thirteenth Amendment. . . .
>
> The slavery which was to be abolished by the Amendment [also] consisted of the incidents of the system . . . . [T]he Thirteenth Amendment was . . . . meant to be a direct ban against many of the evils radiat-

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[4] CONGRESSIONAL GLOBE, 38th Congress, 1st Session, at 1319, 1321, 1324 (1864).

[5] *See Id.* at 1439-1440.

ing out from the system of slavery as well as a prohibition of the system itself.[6]

This encapsulated discussion emphasizes two aspects of the framers' intentions. First, the framers clearly intended the Amendment to do more than simply free the slaves who were still in bondage at the time. Second, the framers understood the Amendment to carry absolute force. Nowhere do the debates reveal any language limiting the construction of the Amendment. An intent requirement, with its inevitable burden of proof problems, would limit the force of the Amendment into complete obliteration.

In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court required that purpose or intent to discriminate must be shown by a plaintiff who claims a violation of the Equal Protection Clause of the Fourteenth Amendment. An examination of this Court's rationale for that conclusion demonstrates that no similar conclusion can be reached in cases under the Thirteenth Amendment.

The foundation for the Court's decision in *Washington* was a finding that "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race". *Id.* at 239.

In contrast, the Thirteenth Amendment, from its inception, has been interpreted as having a decidedly different purpose. In the *Civil Rights Cases*, *supra*, the majority of this Court opined that the Amendment was intended to be used "for the obliteration and prevention of slavery with all its badges and incidents". *Id.* at 20. The Court went on to declare that "the [13th] Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that

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[6] tenBroeck, THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 39 CALIFORNIA LAW REVIEW 171, 180 (1951).

slavery or involuntary servitude shall not exist in any part of the United States". *Ibid.* This established that the Thirteenth Amendment was aimed at the eradication of certain objective conditions—slavery and its badges and incidents—unlike the Fourteenth Amendment, which is designed to prevent discriminatory governmental conduct.

Since the purpose of the Thirteenth Amendment is the eradication of certain objective conditions—slavery and its badges—a Thirteenth Amendment violation requires only proof that these conditions exist. Intentions are irrelevant in the inquiry of whether an action has produced a badge of slavery. Any badge of slavery is absolutely prohibited by the Thirteenth Amendment.

Writing in the *Harvard Law Review*, Kenneth Karst identified this difference between general equal protection classifications and race related discrimination:

> "When the context is race, the problem of the stigma of caste cannot be confined to purposeful stigmatizing action. It is a global problem, this inheritance from slavery and the system of racial subordination that took slavery's place . . . Racism, 1970's style, is a living system, just as Jim Crow was a system. The main difference between the two systems is that today's racism inflicts a greater part of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that these cumulative impacts bear a certain functional resemblance to kicks.
>
> If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the purpose doctrine would make sense, as would its corollary view that stigmatic harm can result only when there is a purpose to cause it. But in America today, where the problem of racism is the problem of eliminating a long established stigma of inferiority—that is, a day-to-day assumption by many

> among us that some of our citizens are not quite persons—it is quite plain as a cattle prod that we are talking about something quite different. A legislature oblivious to this existing stigma of caste will nonetheless reinforce the stigma when it produces racially discriminatory effects through ostensibly 'neutral legislation.' [7]

This concept of institutionalized racism has also found substantial support in social science literature.[8]

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[7] Karst, THE SUPREME COURT—FOREWORD: EQUAL CITIZENSHIP UNDER THE FOURTEENTH AMENDMENT, 91 Harvard Law Review 1, 50-51 (1977).

[8] The following definition has been provided for institutional racism: "Institutional racism refers to the structure of inequality: 1) reflected in the racially based differential allocation of status, privileges, and material rewards in numerous institutional sectors; and 2) shaped by the historically precipitated and currently persisting process of subordination whose mechanisms primarily involve the routine imposition of conventional norms by often unprejudiced role players in the various institutional sectors in a way that, though covert and usually unintentional, produces racially relevant consequences" from "Institutional Racism: A Perspective in Search of Clarity and Research" by Benokraitis and Feagin, in BLACK, BROWN, WHITE RELATIONS IN THE 70's, edited by Willie and and Hamilton, Transaction Books, New Jersey, 1977, at 133. See also, Knowles and Prewitt, eds., INSTITUTIONAL RACISM IN AMERICA, Prentice Hall, New Jersey, 1969, at 5; Sanders, BLACK PROFESSIONALS' PERCEPTIONS OF INSTITUTIONAL RACISM IN HEALTH AND WELFARE ORGANIZATIONS, R.E. Burdick, New Jersey, 1972, at 28; Yetman and Steel, eds., MAJORITY AND MINORITY: THE DYNAMICS OF RACIAL ETHNIC RELATIONS, Allyn and Bacon, Massachusetts, 1971, at 363; Skolnick, THE POLITICS OF PROTEST, Ballantine, New York, 1969, at 180; Jones, PREJUDICE AND RACISM, Addison Welsey, Massachusetts, 1972, at 131; Carmichael and Hamilton, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA, Random House, New York, 1967, at 4; Blauner, RACIAL OPPRESSION IN AMERICA, Harper and Row, New York, 1972, at 187-188; United States Commission on Civil Rights, RACISM IN THE UNITED STATES AND HOW TO COMBAT IT, U.S. Gov't. Printing Office, Washington, D.C., 1970, at 10-11.

The point of this research is clear. Race discrimination in contemporary America has become a highly sophisticated phenomenon. A great deal of the race discrimination experienced by racial minorities cannot be traced directly to the malicious intentions of individuals. Nonetheless, it is still race discrimination. Its impact on affected minorities is in no way diminished by the absence of acknowledged bigots.

To require proof of an intention to discriminate when plaintiffs are asserting claims alleging deprivation of constitutional rights raises two critical points. First, many cases will require plaintiffs to prove something that may not exist in any way susceptible of verification. Second, in cases where malicious motives are in fact present, the requirement would signal those intending racial discrimination to disguise their motivations by building a record in which their racial discriminatory intent is hidden.

The concerns expressed by the Court in *Washington* v. *Davis, supra,* have no place in this case. Unlike the Fourteenth Amendment, which provides a general guarantee of equal protection of the laws, the Thirteenth Amendment created a new, national, Constitutional right of Black emancipation from slavery and any stamp of inferiority imposed by its badges and incidents. The Thirteenth Amendment is unquestionably race-specific. The intention of the framers was to raise the status of slaves to the level of whites.[9] As a Constitutional right, the Thirteenth Amendment requires affirmative protec-

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[9] Cf. The statement of Walter D. Kelly of Pennsylvania at the time of the Amendment's adoption: "This proposed amendment is designed to accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men." Congressional Globe, 38th Congress, 1st Session, at 2987.

tion and preservation by national power, including the federal courts. All branches of the federal government have a duty to ban all badges and incidents of slavery that perpetuate racial inferiority.

Against the sordid landscape of this nation's entire racial history, any action that disproportionately disadvantages Blacks must be recognized indisputably as a badge and incident of slavery in direct violation of the prohibition of the Thirteenth Amendment. This is particularly true in cases raising questions about housing discrimination since this area remains the lynchpin in the maintenance of the institutional racism permeating American society.

II. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THE CLOSING OF WEST DRIVE IS A BADGE AND INCIDENT OF SLAVERY IN VIOLATION OF THE THIRTEENTH AMENDMENT AND SECTION 1982.

A. One of the Specific Purposes of the Thirteenth Amendment Was to Provide Black Citizens Freedom of Movement and the Right to Reside at Locations of Their Own Choosing.

The framers of the Thirteenth Amendment were well aware that white hostility could and would lead to overt and covert attempts to keep Blacks out of certain communities. The concern was not ill-placed. Formal and informal practices excluding Blacks from virtually all choices in housing were widespread.[10] The problems con-

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[10] Cf., Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTE-BELLUM SOUTH, Vintage, New York, 1976, at 256, 257, wherein reference is made to white resistance to living near free Blacks in the ante-bellum South; Wilson, THE BLACK CODES OF THE SOUTH, University of Alabama Press, Tuscaloosa, 1965, on attempts to bar Blacks from cities and to keep them tied to the land in the early post-bellum era; DuBois, BLACK RECONSTRUCTION IN

cerning the living patterns of the newly freed slaves were exacerbated by the existence of the Black Codes, which were designed to maintain semi-slavery by keeping Blacks tied to rural lands as sharecroppers and away from the cities.

Substantial and detailed concern was given to where the newly freed slaves would live. James Harlan of Iowa, one of the key architects of the Thirteenth Amendment, emphasized that the amendment would give Blacks the right to own their own property, as well as to protect and advance their property rights by bringing suits, testifying in court, and speaking and writing freely.[11] Thus, the abolition of slavery contained in the Thirteenth Amendment was designed to accord Blacks the right of "personal freedom without distinction". Included within this "personal freedom was the right to own and protect property".[12]

The Thirteenth Amendment and Section 1982 were also designed to curtail the unbridled activities of newly born terrorist groups, like the Ku Klux Klan, which attempted to adversely affect Black property rights. Congressional reports and documents leading up to the passage of the Thirteenth Amendment are replete with concern over this lamentable state of affairs. There is no doubt that the anti-slavery Amendment and legislation based on it were designed to reverse the situation.[13] The right of

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AMERICA, Russell & Russell, New York, 1935, at 177, on efforts to bar Blacks from renting or living in certain areas in the early post-bellum era.

[11] Belz, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866, Greenwood Press, Connecticut, 1976, at 118-19.

[12] *Ibid.*

[13] General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen (No. 3, 38th Congress, 1st session); Senate Executive

Blacks to protect the value of their property therefore must be addressed by the Court in this case since, as was acknowledged by the Court of Appeals, the act of closing West Drive detrimentally affected the property values of the residents of the nearby Black community, while simultaneously enhancing those of the white community. 310 F.2d at 404.

B. The Official Reasons Given For Closing West Drive Are A Sophisticated Subterfuge For The Intent To Prevent And Dissuade Neighboring Black Residents From Entering Hein Park.

The official reasons given by the Hein Park Civic Association in support of their application for closing West Drive were (1) to reduce the traffic; (2) to increase the safety of children within the subdivision; and (3) to reduce noise, litter, and interruptions in community life. See Brief of Hein Park Civic Association, *Amicus Curiae* in support of the petitioners, at 10.

Nonetheless, the Court of Appeals took notice of the District Court finding that

> the closing was not connected to any uniform city planning effort, directed generally to the preservation of neighborhoods throughout the city; and instead it appears to have been a unique step to protect one neighborhood from *outside influence* which the residents considered *undesirable.* (emphasis added).

610 F.2d at 404.

Documents, Preliminary Report Touching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedmen's Inquiry Commission (No. 53, 38th Congress, 1st session); Senate Report (No. 1, 42nd Congress, 1st session); Senate Reports (No. 41, 42nd Congress, 2nd session) (serial 1484-96); House Reports (No. 22, 42nd Congress, 2nd session) (serial 1529-41); House Miscellaneous Document (No. 52, 40th Congress, 3rd session) (serial 1385).

The Sixth Circuit Court of Appeals concluded that the closing of West Drive would bring about the same result prohibited in *Jones*,

> "[the] herd[ing] of men into ghettos, and mak[ing] their ability to buy property turn on the *color of their skin.*" (emphasis added).

610 F.2d at 404.

Petitioners seek to cloak the discriminatory effect of their actions by attempting to focus the inquiry on local land use regulation. See, Brief for Petitioners, at 32-35. The contention that the closing of West Drive is simply a liberal exercise of local power over land use did not blind the Court of Appeals and should not blind this Court to the racial significance of the action. The Thirteenth Amendment mandates that traditional deference cannot be given to governmental actions that create and/or perpetuate badges or incidents of slavery. Irrespective of the intent of the actors, and as the District Court and the Court of Appeals found, the barrier clearly establishes a racially segregative line of demarcation.

Ordinarily, proper deference is given municipalities to allow them to "weigh competing values" in making their official decisions. However, when governmental action is "arbitrary and irrational," the Court's usual deference to municipal autonomy should give way to an inquiry to insure the constitutionality of the results. One indication of arbitrary governmental action, pointed out by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), is where the result is a "substantive departure" from the norm.

The facts of this case amply support the conclusion that the action of the Memphis Planning Commission was irrational and arbitrary, since it was a substantive de-

parture from the past actions of that body. Although many side streets or alleys, seldom used by other than a few local residents had been closed by the Commission, the closing of West Drive was a departure from this pattern. West Drive is used extensively by people from all parts of the city and is a major thoroughfare, not merely a sidestreet, which provides direct access to downtown and other popular areas of the city, *e.g.*, a park, zoo, aquarium, arts council, art gallery, theatre, children's playground and wading pool, golf course, soft ball fields and public schools.

The closing of this street, despite the protest of hundreds of citizens who would be affected adversely by it, effectively deprives all but a few select white Memphis residents of the use of this street.

In fact, West Drive and Springdale Avenue are but one single street.[14] Any rational consideration of problems associated with one should necessarily consider the problems of the other. The record indicates clearly that only the needs of and effects on the white neighborhood of Hein Park were considered. The closing of West Drive will obviously benefit the predominantly white residents of Hein Park with increased property values, decreased traffic and its noise, and a sense of racial superiority and isolation at direct expense to the predominantly Black residents in the adjacent neighborhood north of Hein Park who will suffer decreased property values, increased traffic and its noise, and a sense of racial inferiority and exclusion. It is all too obvious that no government body properly representing the interest of all Memphis residents could have opted rationally to allow the closing of West Drive.

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[14] See, Map, Appendix to Brief of Hein Park Civic Association, *supra*.

III. PETITIONERS' RELIANCE ON *PALMER* v. *THOMPSON* IS MISPLACED AND RAISES ISSUES NOT PROPERLY BEFORE THIS COURT.

Petitioners seek to confuse the crux of the main issue before this Court with an erroneous and a disingenuous interpretation of the basis for the Sixth Circuit Court of Appeals opinion. The decision of this Court in *Palmer* v. *Thompson*, 403 U.S. 217 (1971) is not applicable since the Court of Appeals decision in this case is based on a proper interpretation of the integral, historic relationship between the Thirteenth Amendment and Section 1982. The issue of the self-executing force of the Thirteenth Amendment is therefore not before this Court.

In *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), 313 F. 2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963), the Federal District and Circuit Courts declared that the enforced segregation by Jackson, Mississippi, in the operation of public parks, swimming pools, golf links, and other public facilities, like an auditorium and the city zoo, was a denial to Blacks of the Equal Protection of the Laws. However, neither Court would issue an injunction and this Court declined certiorari. Jackson did desegregate voluntarily all of its public facilities except the municipal swimming pools, which were simply closed. A second suit, *Palmer* v. *Thompson*, *supra*, was then brought by Black residents to compel the city to reopen the swimming pools and to operate them on an integrated basis. In a five to four opinion, this Court declined to order the reopening of the pools.

Unlike *Palmer* v. *Thompson*, *supra*, which was brought solely on the basis of the Thirteenth and Fourteenth Amendments, this case is based on Section 1982 and the Thirteenth Amendment. *Jones*, *supra*, established that Section 1982 is an independent right of action barring "all racial discrimination, private as well as public, in the sale or rental of property" and "is a valid exercise of the

power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 412-413. A violation of Section 1982 therefore provides ample Congressional authority for appropriate judicial action. Contrary to the inference raised by petitioners, this Court is not being asked to create new law. It is merely being asked to interpret and enforce existing federal law—a function well within the judicial role. This Court should have no difficulty concluding that governmental action resulting in diminished property values for Blacks, while increasing those of whites, constitutes a badge and incident of slavery in restraint of the fundamental right of Blacks to buy and own property.

Palmer is also distinguishable on the facts. The entire municipal pool system had been closed at the time the suit was filed. All Jackson residents, Black and white, were deprived of the use of public pools. This is not the situation with the closing of West Drive. Not only do the white residents of Hein Park retain the use of West Drive, but they do so under enhanced conditions. At the same time, the Black residents of the adjacent neighborhood to the North of Hein Park are effectively cut off from the use of West Drive under clearly detrimental conditions.

CONCLUSION

Amici are not unmindful that this is the fourth case, in as many terms, raising serious questions about American race relations, in which they have offered their humble guidance. During this period, despite our many hopes, America's racial problems have grown increasingly complex and serious. At the same time, there has been a rapid rise in the pervasive unwillingness of the American people and their institutions to address, much less attempt to resolve, any of these problems.

West Drive and Springdale Avenue are a single street. If this Court permits the closing of West Drive, such a decision may well imply judicial acquiescence, in form and fact, to two separate and unequal American societies, one white and one Black. A society purporting to cherish both domestic tranquility and the rule of law will have neither when it continues to deny the protection of the law to its Black citizens. A dissent by Associate Justice Thurgood Marshall in a recent decision by this Court best stated the implications:

> It is time to realize that manipulating doctrines and drawing improper distinctions under the . . . [Civil War] Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The . . . requirement of proof of 'intentional discrimination', . . . may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple minded modes of discrimination', . . . it cannot expect the victims of discrimination to respect political [or judicial] channels of seeking redress.

City of Mobile, Ala. v. *Bolden*, —— U.S. ——, ——, 100 S.Ct. 1490, 1540 (1980).

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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AMICI STATEMENTS OF INTEREST

The *Affirmative Action Coordinating Center* (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR), and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief. The AACC, in all of its work, has stressed the importance of the 13th Amendment as the basis for affirmative action, hence our interest in this case.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled AACC News. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of the

principle of reverse discrimination by the courts and the continued attacks on affirmative action plans, as in *Bakke*, *Weber*, and *Fullilove*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the power of Congress to enact legislation to eliminate the effects of 400 years of institutional discrimination, the goal of racial equality will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. It's commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated it's full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to cosponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (CCR) was born of the civil rights movement and the struggle of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Associated Students of Colorado State University*, the *Black American Law Students' Association*, the *Center for Law and Education* of Cambridge, Massachusetts, the *Civil Rights-Civil Liberties Research Committee of Harvard Law School*, the *Community Law Center of Santa Fe, New Mexico*, the *Federation of Southern Cooperatives*, the *Harambi Student Union of North Carolina Central University*, the *Labor Research Association, Law Students Civil Rights Research Council, Liberation News Service, Minority People's Council on the Tennessee-Tombigbee Waterway, National Alliance Against Racist and Political Repression, National Child Labor Committee*, the *Panamerican-Panafrican Association, People's Settlement Association, Prisoner's Rights Organized Defense, Schenectady Community Action Program, Southern Christian Leadership Conference* (SCLC), *Southern Poverty Law Center, Southern Regional Council, Small Tribes Organization of Western Washington, Union W.A.G.E., Women for Racial and Economic Equality* (WREE), and *Women's Institute for Freedom of the Press*, national and local organizations which have joined the AACC as *amici curiae* in this brief, represent many sections of American society and have many diverse interests. They share a mutual hope that the Court will use the instant case to advance and not to set back the struggle to rid our nation of the haunting spectres of racial discrimination and racial hatred. These groups share a common concern about the continuing exclusion of minorities from the mainstream of housing opportunities that is the legacy of slavery and discrimination. They are aware that the present case may well determine whether this exclusion will become overtly intractable or whether the mandate of the Thirteenth Amendment will be enforced finally.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS
and EDWIN McBRAYER,

Petitioners,

V.

N. T. GREENE, ELNORA PRIEST CROSS,
EDWIN OWENS and CAROLYN BURSE,

Respondents.

MOTION OF HEIN PARK CIVIC ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Comes now the Hein Park Civic Association and pursuant to Rule 42, respectfully moves this Honorable Court for leave to file a Brief Amicus Curiae in this cause in support of the petitioners, the City of Memphis, et al. The Hein Park Civic Association, through W. Michael Richards, attorney, has written to Mr. A. C. Horton, Jr. and Miss Judy Curry of the Memphis Area Legal Services and Mr. Alvin Chambliss, who represent, respectively, the respondent intervenors and the respondent, N. T. Greene. No reply has been received from any of them. Therefore, this motion is made since consent was not timely obtained.

The Hein Park Civic Association is an unincorporated association composed of residents of the Hein Park Subdivision in the City of Memphis.

NATURE OF APPLICANT'S INTEREST

The Hein Park Civic Association consists of members who are homeowners and residents of the Hein Park Subdivision through which runs West Drive. The controversy in the instant case concerns the action of the City of Memphis in closing the north end of West Drive. This closing of West Drive by the City of Memphis was done at the request of the members of the Hein Park Civic

Association for the purposes of increasing the safety of their neighborhood, improving the quality of life within the subdivision by reducing noise, traffic hazards and litter. The members of the Hein Park Civic Association are therefore most affected by the action of the Court of Appeals for the Sixth Circuit in reversing the United States District Court and holding that the closing of West Drive constituted a "badge of slavery".

QUESTIONS PROPOSED TO BE RAISED BY AMICUS CURIAE

Amicus Curiae fully supports the position of the City of Memphis, and its brief will discuss the question of whether a disparate impact of a racially neutral municipal street closing, done without racial motivation, constitutes invidious discrimination in violation of the Thirteenth Amendment or 42 U.S.C. § 1982.

In addition, the Amicus brief proposes an analysis of the Court of Appeals opinion, showing

(1) that there was not in fact any appreciable detriment to black persons from the closing of the street, and

(2) that the effect of the Court of Appeals opinion is a denial of equal protection to the white residents of Hein Park subdivision.

WHEREFORE, the Hein Park Civic Association respectfully moves the Court for permission to file a brief amicus curiae in support of the Petition of the City of Memphis, et al.

Respectfully submitted,

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BRIEF OF HEIN PARK CIVIC ASSOCIATION AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE AMICUS CURIAE AND ITS INTEREST

Hein Park Civic Association consists of members who are homeowners and residents of Hein Park Subdivision. This litigation concerns the closing by the Memphis City Council of the northern end of West Drive, a street which bisects Hein Park, at the request of the Association.

The closure was upheld by the United States District Court for the Western District of Tennessee, but reversed by the Sixth Circuit, an opinion from which this writ of certiorari has been granted. The holding of the Sixth Circuit that the closing of West Drive by the City at the request of its residents constituted a "badge of slavery" and the reopening of said street with the attendant increase in traffic in a residential area both directly affect members of the Hein Park Civic Association, many of whom live on West Drive.

QUESTIONS PRESENTED FOR REVIEW

1. Where a municipal government closes a street through a residential subdivision, without any racial motivation, but solely to reduce traffic, promote safety and enhance the quality of life for residents of the subdivision, does such action become a

"badge of slavery", prohibited by the Thirteenth Amendment, or a violation of 42 U.S.C. § 1982 solely because it will inconvenience the owners of property in a nearby neighborhood which is predominantly black?

2. Does the action of a municipality in closing a street for the purpose of traffic reduction (a permissible goal) violate the Thirteenth Amendment or 42 U.S.C. § 1982 solely because of disparate impact between non-residents of the area who are black and white area residents?

3. Does an injunction against the closing of a street in a residential subdivision deny equal protection of the law to the residents of the subdivision, by denying to them a reasonable and normal protection solely because they are of the white race?

STATEMENT OF THE FACTS

This case arises out of the response of the City of Memphis to a petition by residents of Hein Park Subdivision to close the northern end of West Drive, a street which traverses the subdivision from north to south, connecting two major east-west traffic arteries, East Parkway and Jackson Avenue.1/

1/ See Map, Appendix A to Court of Appeals Opinion. App. 168. A copy of a more legible map of the area is attached hereto for the convenience of the Court.

West Drive, inside the subdivision, is a two-lane street without sidewalks. It connects with Springdale Street which extends north from Jackson as a major, four-lane traffic artery.

Prior to the closing of West Drive, large amounts of traffic poured into it from Springdale and Jackson, headed south to North Parkway, and also in the reverse direction. It is noteworthy that use of West Drive does not shorten the ordinary motorist's route by so much as one foot. There is no evidence of any need for West Drive as a traffic artery. Three major four-lane streets, McLean, University and Trezevant, parallel West Drive, one to the east and two to the west of it, all linking East Parkway and Jackson Avenue.2/

In accordance with standard city planning policies of protecting residential subdivisions from unnecessary traffic, the City of Memphis granted the Hein Park residents' petition and by resolution closed West Drive.

The plaintiffs, black persons who claimed to own or have some interest in property north of Hein Park, sued in the United States District Court to enjoin the City from closing the street. Their

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2/ See Map, App. 168; also App. 122 (Testimony of Robert Miller).

Complaint averred that the street closing violated 42 U.S.C. § 1982 by conferring benefits, to wit, the privacy and quiet of an exclusive dead-end street, on whites which the City had refused to confer on similarly situated black neighborhoods.3/ This Complaint was dismissed on motion.

On appeal, the Sixth Circuit held that plaintiffs' allegations of racial motivation on the part of the City was sufficient to state a cause of action under 42 U.S.C. §§ 1982 and 1983. However, the Court expressly advised plaintiffs that the validity of their complaint rested entirely upon their claims of deliberate racial motivation. Greene v. City of Memphis, 535 F.2d 976 (6th Cir. 1976)("Greene I").

Upon remand and trial, the district court expressly found no sufficient proof of racial motivation on the part of the City, and no detriment to any property rights of plaintiffs, and again dismissed their Complaint.4/ App. 161, 155.

3/ See Greene v. City of Memphis, 535 F.2d 976, 978 (6th Cir. 1976); App. 40.

4/ The plaintiffs did not even attempt to prove their allegation that the City had declined similar street-closing petitions by black citizens.

On second appeal, the Court of Appeals dismissed its earlier requirement of racial motivation as "dicta" and held that the district court had erred in failing to give relief, because despite absence of racial motivation, "the pattern of discrimination here was indeed 'stark' and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982." App. 180.

The Court expressly declined to "establish any legal guideline for the determination of when conduct may amount to a badge of slavery." However, the only specific statement which it made in that regard was that: "The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black." App. 185.

In desperately reaching for some basis for relating its holding to plaintiffs' property rights, as required by 42 U.S.C. § 1982, the Court referred to "some evidence credited by the district court, of an economic depreciation in property values in the predominantly black residential area...." App. 185.5/

5/ Emphasis added.

This is a truly unfortunate twisting of the record. The district court had made the express finding that plaintiffs had suffered no damage to their property. Plaintiffs' own expert witness testified that in his opinion "there would not be a lessening of value in those properties in the Springdale area." App. 176. The district court acknowledged this. App. 155.

To parlay that testimony and finding into a conclusion by the appellate court that plaintiffs have been deprived of property rights in violation of § 1982 involves impermissible liberties with the record.

Judge Celebrezze dissented upon the grounds that 42 U.S.C. § 1982 requires proof of discriminatory intent, which was not present here. There was "not even a scintilla of evidence" that the City closed the street because of the adverse effect of such closing on the black citizens north of Hein Park, and neither the disparate impact of the closing nor its historical background constituted circumstantial evidence of racial intent. App. 196.

The essential holding by the Court of Appeals is that, upon the district court's findings, and the proof "credited" by him, there existed a pattern of discrimination which "was indeed 'stark' and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth

Amendment and subject to relief under 42 U.S.C. § 1982." App. 180.

This conclusion was arrived at despite the following findings of the district court:

(1) That the action of the City Council did not create a benefit for white citizens which has been denied to blacks; App. 159.

(2) There is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation;6/ App. 161.

(3) "This District Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred;" App. 161.

(4) That "[t]his Court does not find a purpose or intent to racially discriminate...." App. 162.

(5) That the trial judge should refrain from applying his judgement on the merits, even though he felt the closing would have an adverse impact on

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6/ The record discloses that this is an understatment. As Judge Celebrezze pointed out in dissent, "The record contains not even a scintilla of evidence" of unlawful racial intent. App. 196.

black citizens and would cause aggravation of racial hostility, with attendant retribution and vandalism. App. 163.

SUMMARY OF ARGUMENT

This case involves an ordinary street closing, for the purpose of protecting a residential subdivision from unnecessary traffic. The closure was without any racial motivation. Under those circumstances the action of the city does not constitute a violation of the Thirteenth Amendment, or of 42 U.S.C. § 1982, as against black property owners outside the subdivision who claimed that the closing had a disparate effect upon them.

It is clear that a municipality has the right to protect the quality of life in residential subdivisions by restricting the flow of traffic through it.

Where a municipal action racially neutral on its face, restricts blacks and whites equally, and differentiates only on a geographical basis, it cannot be deemed a "badge of slavery."

Even though a municipal action has a disparate effect upon certain black persons, that alone does not render it an unconstitutional discrimination. To be unlawful, such action must be proved to have been motivated by a discriminatory purpose or intent, i.e., an intent

to take the action "because of" its adverse effects upon an identifiable group. There is not the slightest suggestion in the record here that the closing of West Drive was racially motivated, much less done because of its effect upon the property of the plaintiffs lying outside the Hein Park subdivision.

The Court of Appeals reached the conclusion that the closing of West Drive amounted to "stark discrimination" and a "badge of slavery", not because of any racial motivation on the part of the city, but upon allegations that such action would create racial hostility, retributions and vandalism. The validity of a municipal government's action should not depend upon the reaction to it of certain elements in the community.

The ruling of the Court of Appeals deprives the residents of Hein Park subdivision of the benefit and protection of a permissible action of their city government, solely on the ground that they are members of the white race.

In the absence of any intent to discriminate against blacks, or any action aimed at blacks as a group, or any substantial injury to blacks, the closing of West Drive should not be enjoined.

The Closing Of A Street To Protect A Residential Subdivision Is A Legitimate Municipal Action

On January 9, 1973, the Hein Park Civic Association petitioned the City Council to close West Drive at its intersection with Jackson Avenue in order to:

1. Reduce flow of traffic using subdivision streets,

2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, and

3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interruption of community living. App. 135, Trial Ex. 13.

The accomplishment of these goals is obviously permissible municipal policy.

In a line of recent cases, this Court recognized that reducing traffic flow in a residential neighborhood and taking other steps to increase the quality of life therein are permissible goals of the legitimate exercise of the police power retained by municipal governments. In Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797,

94 S. Ct. 1536 (1974), this Court interpreted the validity of a zoning restriction limiting the number of non-family residents in a dwelling and observed as follows:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker [348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954)], supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. 416 U.S. at 9.

In County Board v. Richards, 434 U.S. 5, 54 L. Ed. 2d 4, 98 S. Ct. 24 (1977), a municipality enacted a restriction to stem the flow of traffic from commercial and industrial districts into adjoining residential neighborhoods. This Court upheld the municipality's action in question and observed as follows:

> A community may also decide that restrictions on the flow of outside traffic into par-

> ticular residential areas would enhance the quality of life thereby reducing noise, traffic hazards, and litter. By definition, discrimination against non-residents would inhere in such restrictions. 434 U.S. at 7.

As Judge Celebrezze pointed out, the disparate impact of the city's action is between residents and non-residents of Hein Park, regardless of their race. All motorists, black or white, using West Drive, are affected identically. County Board v. Richards, supra, expressly dealt with just such an issue and held that the Constitution does not

> presume distinctions between residents and non-residents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction shown by an ordinance like Arlington's rationally promotes the regulation's objectives. 434 U.S. at 7.

Thus, the closing of West Drive in order to decrease vehicular traffic in the residential neighborhood and thereby foster the safety of the many children who live therein and enhance the quality of life of the residents is a permissable action taken by the City of Memphis, in the absence of an intent to

discriminate against black persons or to violate a person's right to hold property under 42 U.S.C. § 1982.

The Closing Of The Street Does Not Constitute A "Badge Of Slavery"

As pointed out above, the reasoning of the Court of Appeals in the present case is simply that the action of the city in closing West Drive constitutes a "badge of slavery" and therefore violates the Thirteenth Amendment. This is clearly a drastic oversimplification of the issue.

In Palmer v. Thompson, 403 U.S. 217, 226, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971), this Court held that municipal action in closing swimming pools did not constitute a "badge of slavery", even though its effect was to perpetuate separation of the races. In rejecting the "badge of slavery" argument, this Court said:

> The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident of slavery". Consequently, the argument seems to run, this Court should declare that the closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would

severely stretch its short simple words and do violence to its history. 403 U.S. at 226.

The contention that the city's action was a "badge of slavery" was dismissed as a "faint and unpersuasive argument." Id.

In the instant case, the "badge of slavery" argument is much weaker than in Palmer v. Thompson. Here, there was no racial motivation, no intent to discriminate, no effort to separate blacks from whites, no municipal action aimed at the black community.7/ To the extent that there is a disparate impact of the city's action, it is between residents and non-residents, regardless of their race. All motorists, black or white, are inconvenienced equally. As was pointed out by Judge Celebrezze, there is no constitutionally guaranteed right of free access to neighborhood streets. If black persons are more inconvenienced than whites from the closing of West Drive, this is a

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7/ These facts completely distinguish this case from those contained in Justice Douglas' list cited by the Court of Appeals. App. 183-84. Each of those cases involved deliberate, racially motivated actions aimed directly at blacks as a class.

geographical happenstance, and not an incident of slavery. There is not the slightest hint of an indication in the record that the city's action would have been any different if all of the people residing north of Hein Park had been white.

Whatever a "badge of slavery" may be, it cannot exist without racial motivation.

Disparate Impact Does Not Amount To Unlawful Discrimination

In its summary of the facts relied on for its conclusion, the Court of Appeals stated that

> The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. App. 185.

This appears to be the ultimate basis of the finding of the stark discrimination. In relying on a disparate impact for its conclusion of validity, the Court of Appeals clearly misconstrued the law as announced by this Court.

In Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), this Court held that a disproportionate racial impact did not render

an otherwise neutral action discriminatory. The Court said:

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a disproportionate impact.8/ 426 U.S. at 239.

Recognizing that an invidious purpose may often be inferred from the totality of the relevant facts, including disparate impact, the Court said:

> Disproportionate impact is not irrelevant but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule...that racial classifications are to be subject to the strictest scrutiny and are justifiable only by the weightiest of considerations. 426 U.S. at 242.

In a similar vein, Chief Justice Burger, concurring in Palmer v. Thompson, 403

8/ Emphasis by the Court.

U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1976) said:

> We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to microscopic scrutiny for forbidden motives rendering the decision unconstitutional. 403 U.S. at 228.

Judge Celebrezze in his dissent disposed of any contention that an invidious purpose might be inferred from the historical background of the city's action. It was done in the normal manner, in resonse to an appropriate application to the Planning Commission, and was consistent with approvals granted to other applicants, including black citizens, to close streets and alleys.

Without Discriminatory Purpose There Is No Denial Of Equal Protection

One of the strangest things about this case is the Court of Appeals' rejection, on the second appeal, of the basic proposition announced on the first appeal. In Greene I, 535 F.2d 976 (6th Cir. 1976), the Court, in remanding the case for trial, emphatically instructed the district court that, in order to

establish a § 1982 or § 1983 claim, the plaintiff

> must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection, or, alternatively, to command an inference of racial motivation. 535 F.2d at 979.

That statement is in accord with the law as held by this Court. However, on the second appeal, the Court of Appeals tossed aside that statement as dicta (App. 171), and held that the trial judge erred in following its earlier instruction. App. 180.

The fallacy of the Court's thinking, on the second appeal, is revealed in a footnote near the end of the opinion, where it said:

> We expressly leave open here the question to what extent intent is even an element of the plaintiff's case under Section 1982. App. 186.

With deference, it is submitted that that is not an open question. This Court has held, time and again, that

equal protection is violated only when a discriminatory purpose is shown.

The most recent instance is Personnel Administrator v. Feeney, ____ U.S. ___, 60 L. Ed. 2d 870, ___ S. Ct. ____ (1979). In upholding a Massachusetts veterans' preference act which impacted differently upon men and women, this Court said:

> But, as was made clear in Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 579, 96 S. Ct. 2040, and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose. ___ U.S. ___, 60 L. Ed. 2d at 883.

Furthermore, the Court defined "discriminatory purpose" as meaning more than mere volition or awareness of consequences. It implies that the decisionmaker

> selected or reaffirmed a particular course of action at least in part "because of," not

> merely "in spite of," its adverse effects upon an identifiable group. ____ U.S. at ____, 60 L. Ed. 2d at 887-88.

The case closest in point factually is Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977) where this Court reversed a Court of Appeals ruling which struck down a zoning ordinance because in practice it produced a racially discriminatory effect. The Court found that absence of racial motivation on the part of the city was determinative, stating:

> Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance. 429 U.S. at 270-71. (Emphasis added).

In reaching its decision in Arlington Heights, the Court relied upon Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976),

where it had upheld a testing requirement for police which tended to exclude more blacks than whites. The contention there was that the city's practice violated, among other things, 42 U.S.C. § 1981. In holding that disparate impact alone would not invalidate the city's action, the Court took pains to disavow the proposition "that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation...." 426 U.S. at 245.

There can be no distinction of this case from Feeney, Arlington Heights and Washington v. Davis on the ground that plaintiffs here invoked § 1982 instead of the Equal Protection Clause. The Court of Appeals itself, in the passages quoted from its Greene I opinion, recognized this as an equal protection issue. The Washington v. Davis holding with respect to a § 1981 claim was cited as controlling in Arlington Heights, which was brought under the Fourteenth Amendment and the Fair Housing Act. (42 U.S.C. § 3601). The substantive principle that unlawful discrimination by regulation requires a racial motivation is applicable regardless of the statute invoked. It is the substantive municipal action, not the legal nomenclature, which must control.

The Only Evidence Of "Stark Discrimination" Is The Negative Reaction Of Some Black Citizens

The ultimate finding of the Court of Appeals is that the closing of the city street is discrimination which is so stark that it constitutes a badge of slavery. What evidence or finding of the trial court leads to this conclusion? There is no scintilla of evidence of racial motivation on the city's part. There is no finding by the trial court of detriment to the property of blacks; their own expert testified to that effect. There is not even any appreciable traffic inconvenience; the users of West Drive do not save any distance by making that street a traffic artery.

The only evidence of "stark discrimination" cited by the Court of Appeals is the negative reaction of certain black citizens to the closing of the street. The opinion cites the trial remark of the District Judge that the city's action would aggravate racial tensions and cause "retribution and vandalism," and "defiance and confrontation". App. 173. It quoted from the expert testimony of a college professor psychologist that the reactions of the blacks would be an "increase in hostility" and "acts of vandalism" and destruction of "harmony," and resultant increase in police

activity.9/ App. 176. The only evidence cited by the Court of Appeals relating to any effect on property values is the theorizing of a real estate expert that the resentment of people in a lower economic social group against the city's actions on behalf of wealthier Hein Park residents would affect their "moralistic values on their properties", so that they would not keep them up as well. App. 176.

It is clear, therefore, that the Court of Appeals felt a racially neutral street closing became wrongful just because some black citizens resented it. The "stark discrimination" arose not from the actions of the city, but the reaction of certain blacks. The evils anticipated to result from the closing were not direct property depreciation or even inconvenience, but hostility, vandalism and disorder on the part of the black community.

Such reasoning finds no precedent in the opinions of this or any other court. It must not be allowed to become a part of our jurisprudence.

9/ The event has proved these predictions totally wrong. In the year that the street has been closed, there has been no disturbance whatsoever on the part of the black neighbors.

The Result Below Denies Equal Protection To Hein Park Residents

As heretofore pointed out, this Court has long recognized the propriety of a municipality's protecting residential areas against unnecessary and undesirable flow of traffic. Village of Belle Terre v. Boraas, supra, County Board v. Richards, supra. The residents of Hein Park subdivision are entitled to such protection, in the discretion of the municipal officials. They have been afforded such protection by the closing of West Drive. It concededly benefits their property values.

The ruling of the Court of Appeals would deprive the Hein Park residents of these benefits and values, solely because they are of the white race.10/ If the residents of the subdivision were black, there would be no issue about the street closing, although the traffic effect upon the Springdale area residents would be exactly the same. Conversely, if Springdale were predominantly white, then the residents of that area would not have any right to contest the closing of West Drive.

The Hein Park residents are therefore deprived of appropriate municipal

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10/ Ironically, this is not in fact the case. There are a number of black property owners in the subdivision, one on West Drive.

protection and benefits, and their properties depreciated, for no other reason than their race, under the Court of Appeals ruling. This is certainly not a result that should flow from a statute whose purpose is to promote equal protection of the laws.

As stated in Regents of the University of California v. Bakke, 438 U.S. 265, 289-90, 294, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978),

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.
>
> ....
>
> [O]ver the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded on the doctrine of equality.'

There is nothing in the record in this case which justifies invocation of some doctrine of reverse discrimination to justify the unequal treatment received by Hein Park at the hands of the Court of Appeals, solely because of the ancestry of its residents.

CONCLUSION

This is not a case in which black citizens have been subjected to invidious discrimination. It is a usual and normal action of a municipality, to accomplish a permissible goal.

There is no evidence of racial motivation, and no substantial evidence of detriment to plaintiffs' property values.

The opinion of the Court of Appeals should be reversed.

Respectfully submitted,

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MAP

Overton Park
Southwestern University
University Park
Lake
Illinois Central R R
S R R
Frank Tobey Park
Old Park
Christian Brothers College
Center City
Golf Courses
Stadium
Auditorium
Coliseum
Zoo
Pool
Tennis Courts
Creek
Fork
Circle
Cir
Pl
Ave
St
Blvd
Dr
Ct
Rd
Pkwy
Terr
Lane
Court
Place
Drive
Boulevard
Parkway
Terrace
Road
Avenue
Street
Circle
Lake
Park
Creek
Fork
Tennis Courts
Golf Courses
Stadium
Auditorium
Coliseum
Zoo
Pool
Center City
Illinois Central R R
S R R
Frank Tobey Park
Old Park
Christian Brothers College
Southwestern University
University Park
Overton Park
Lake
Creek
Fork
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Terr
Lane
Court
Place
Drive
Boulevard
Parkway
Terrace
Road
Avenue
Street